

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME X - PM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
OCTOBER 6, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 with a 30 to 40 percent reduction in phosphorus, you
2 would achieve a status quo; in other words, the lake
3 wouldn't continue to degrade as it had as evidenced
4 from the historical studies that were evaluated for
5 this project.

6 Q. So would the 30 to 40 percent reduction have
7 kept the lake the way it was in 1996?

8 A. Approximately.

9 Q. Approximately. What was the basis for the 70
10 to 80 percent current total phosphorus loading
11 reduction?

12 A. The 70 to 80 percent current total phosphorus
13 loading would be the loading reduction that would be
14 required to shift the lake's status from a primarily
15 eutrophic system to a mesotrophic system.

16 Q. Is the eutrophication that was found by this
17 study in Lake Tenkiller a strictly natural thing?

18 A. Eutrophication is a natural phenomenon. As
19 lakes age, they accumulate nutrients and sediment from
20 their watersheds, but the rate of eutrophication that
21 was documented in Tenkiller between the time that it
22 was impounded and the study was determined to be
23 excessive.

24 Q. Okay. Just in general terms, do the state's
25 water quality standards establish what the state

1 considers to be natural eutrophication -- a natural
2 level of eutrophication?

3 A. Yes.

4 Q. Okay. And is it fair to say that what was
5 found in 1996 was worse than the --

6 MR. GREEN: Objection; leading.

7 MR. ELROD: Object.

8 THE COURT: Sustained.

9 Q. (BY MR. NANCE) What was the concern about
10 the ability to reach the 70 to 80 percent reduction?

11 A. There was concern that in order to reach the
12 70 to 80 percent reduction, there would have to be
13 dramatic shifts in land use in the watershed, perhaps
14 removal of a significant portion of the agricultural
15 community, and a shift back to the natural forested
16 conditions of the watershed.

17 THE COURT: Mr. Nance, if you'll indulge
18 me, I need to make a seventh-grade football game.

19 We'll resume at 9:30 tomorrow morning.

20 MR. NANCE: Yes, Your Honor.

21 *(The proceedings were recessed)*
22
23
24
25

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VOLUME XII - PM

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS

OCTOBER 7, 2009

BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
United States Court Reporter

1 Q. A project?

2 A. Yes.

3 Q. Okay. What was the impetus for starting that
4 project?

5 A. The direct -- the water quality director at
6 the time was Larry Edmondson and he met with John Ward
7 of The Poultry Federation.

8 MR. GREEN: Objection, Your Honor. I
9 think we're going to get to hearsay here.

10 MR. NANCE: It's a little premature.
11 We'll try to walk around that, Your Honor.

12 THE COURT: Thank you, sir. I don't
13 believe we got to hearsay yet.

14 But go ahead, Mr. Nance.

15 Q. (BY MR. NANCE) Without telling us -- were
16 you involved in those discussions?

17 A. Yes.

18 Q. Without telling us what was discussed, did
19 the Oklahoma Conservation Commission do anything as a
20 result of discussions with Mr. Ward and The Poultry
21 Federation?

22 A. As a result of those discussions, we
23 contacted our counterparts in Arkansas to ask them for
24 an example of a work plan that they had applied to EPA
25 for funding -- to fund litter transport out of the

1 Eucha-Spavinaw and Illinois River Watersheds.

2 Q. And did you get a plan from your counterparts
3 in Arkansas?

4 A. We got a plan from our counterparts in
5 Arkansas.

6 Q. What happened after that in terms of
7 developing a program?

8 A. We then drafted a mirror work plan for our
9 side of the watershed -- or our side of the border and
10 applied to EPA Region 6.

11 Q. Okay. And was that application approved?

12 A. Yes.

13 Q. In summary detail, tell us how the program
14 worked in terms of how it was financed with the people
15 who were moving the litter.

16 A. The program primarily worked through BMP's,
17 Incorporated, which is a nonprofit entity that was
18 assigned the task of coordinating the hauling of
19 litter out of these watersheds.

20 Their role was to find a certified -- find an
21 appropriate entity to do the hauling, find a buyer for
22 the litter, and arrange a source of litter to meet
23 that buyer's needs, and then they handled all the
24 paperwork and made sure that the guidelines of the
25 program were followed.

1 Q. Okay. How much did it -- did it cost to move
2 litter, how much a ton, or however you measured it?

3 A. In the beginning, the program was designed to
4 fund litter-hauling at -- at 2.6 cents per ton per
5 mile. But as we progressed through the program, it
6 became apparent that that wasn't enough funding and so
7 it changed to 5 cents per ton per mile.

8 And what that meant was that we weren't
9 necessarily hauling any less litter than we had
10 originally intended to, it just meant that we would
11 not be able to haul litter as far out of the watershed
12 as we had wanted to.

13 THE COURT: You're speaking in the past
14 tense. You're not currently doing this?

15 THE WITNESS: There are -- yes, there
16 are current programs to do that, but they are
17 structured somewhat differently.

18 THE COURT: All right. And is your
19 agency involved?

20 THE WITNESS: Yes.

21 THE COURT: Is it correct that the value
22 of phosphorus has recently gone up in the market?

23 THE WITNESS: The value of phosphorus
24 keeps changing.

25 THE COURT: It's a market.

1 Obviously, you can bootstrap in if the
2 activities of the third party are contracted. I'm
3 just trying to see if there's any statement here.

4 MR. NANCE: We -- on page 11 of 36, Your
5 Honor, it talks about the Oklahoma problem -- excuse
6 me -- the project and the role of BMP's, Inc. I mean,
7 the entire document is a report of the Conservation
8 Commission; it's not a BMP's, Inc. report.

9 On page 15, it talks about how much litter
10 was moved under the Oklahoma program and it reports
11 the activity -- it does report the activities of
12 BMP's, Inc., which the integrators evidently founded.

13 THE COURT: All right. But this program
14 was set up through your office; is that correct?

15 THE WITNESS: Yes.

16 THE COURT: It would appear to me that
17 this is a proper report to the EPA pursuant to grant
18 funding that would meet the requirements of 803(8)(A).
19 The objection's overruled and Exhibit 5881 is
20 admitted.

21 Go ahead.

22 MR. NANCE: Thank you, Your Honor.

23 Q. (BY MR. NANCE) Ms. Phillips, did the
24 Conservation Commission have a measure of cooperation
25 from the integrators in carrying out this project?

1 A. Yes.

2 Q. And what did the integrators do to help
3 promote this project?

4 A. In addition to the support that they provided
5 BMP's, Inc., they also provided the match that was
6 necessary for this project. In order for us to obtain
7 319 funds from the federal government, we must match
8 those funds with 40 percent nonfederal dollars. The
9 integrators provided the 40-percent match to this
10 project.

11 Q. And -- oh, I saw it as I was flipping through
12 here. Just a moment.

13 Was approximately -- well, how much -- how
14 much litter approximately was moved?

15 A. Approximately -- just a little under 50,000
16 tons was moved through this project.

17 Q. And how long did the project last?

18 A. About nineteen months.

19 Q. All right. Ms. Phillips, did this project in
20 the fullness of time come to an end?

21 A. Yes.

22 Q. Did there come to be a second project that's
23 run by your office?

24 A. Yes.

25 Q. And how did that -- how did that project come

1 to pass?

2 A. We -- as -- when we ran out of funds from
3 this project, it was evident that there was the desire
4 and a market was developing for the use of poultry
5 litter in other areas of the state, but we were
6 approached by Mr. Steve Patrick from Tyson who
7 encouraged us to continue to find funding for the
8 program because it was believed that we just needed to
9 incentivize it for just a little while longer for the
10 program to really take off.

11 Q. Okay. And after Mr. Patrick did that, what
12 happened to bring the second program into operation?

13 A. There had been some complaints about the way
14 that we -- that the first program was implemented, and
15 so we evaluated similar programs. Namely, there's a
16 program administered by the NRCS that also subsidizes
17 litter transport out of these sensitive watersheds.

18 That program, however, provided the subsidy
19 to the buyer instead of a subsidy to the grower and
20 the haulers. And so our second program was mirrored
21 after the NRCS, and instead of the program being
22 administered through BMP's, Inc., it was administered
23 through the conservation districts of the state and
24 they were responsible for making sure that the program
25 guidelines were followed.

1 Q. Okay. And is that program still going on?

2 A. Yes.

3 Q. And is it a 319 program like the earlier
4 one?

5 A. Yes.

6 Q. So you had to work it through EPA and satisfy
7 all the requirements?

8 A. Yes.

9 THE COURT: Help me out here. When you
10 were saying a subsidy to the provider as opposed as a
11 subsidy to the grower and haulers, who are you
12 referring to when you reference "providers"?

13 THE WITNESS: I'm sorry. I said to the
14 buyer, so the person that buys the litter.

15 THE COURT: Okay. It came out here on
16 the daily copy as "provider."

17 THE WITNESS: Sorry.

18 Q. (BY MR. NANCE) So the person who's buying
19 the litter gets the subsidy, and then it's their
20 job -- or is it their job to find the litter and to
21 move it to where they want it?

22 A. It is the buyer's job to find the litter and
23 to arrange for it to be hauled by a person who is
24 certified to haul. And it is -- most importantly it's
25 their job to arrange for it to be land-applied by

1 someone who's certified by the State of Oklahoma to
2 apply litter.

3 Q. Okay. How much longer will that program
4 run --

5 A. That --

6 Q. -- the second program?

7 A. That program is funded under a 2008 319
8 grant. Our time line on that grant will run out in
9 2011. We are currently evaluating the need for that
10 program to be continued because there are -- the
11 demand for participation in the program has slowed.

12 Q. Okay. Do you know why it slowed?

13 A. For reason -- primarily I believe for reasons
14 that we discussed earlier.

15 MR. GREEN: Objection. Objection; lack
16 of foundation, calls for, as far as I can tell,
17 speculation.

18 THE COURT: The question calls for a
19 "yes" or "no" answer.

20 First of all, do you know the reason why it
21 slowed? Not the reason, but do you know why demand
22 slowed?

23 THE WITNESS: Yes.

24 THE COURT: All right. Now
25 foundation.

1 restricted?

2 A. Yes.

3 Q. Do you know in Arkansas whether the
4 application of commercial fertilizer is restricted
5 along with the application of poultry litter?

6 A. Yes. According to the Arkansas regulations
7 that I've read, it is.

8 Q. So to that extent, the regulations in
9 Arkansas are more stringent than those in Oklahoma?

10 A. To that extent, yes.

11 Q. Going back to your Exhibit 5881, which is the
12 2007 report -- it's the thin one --

13 A. Okay.

14 Q. -- I just want to present some information to
15 the court from your 2007 report, November 2007.

16 In the list of figures which is contained on
17 the table of contents page, which is the first full
18 page of the document --

19 A. Yes.

20 Q. -- doesn't even have a Roman numeral -- it's
21 page 3, I guess. Figure 2, you point out that the
22 area is not suitable for row crop production, but then
23 you state, "Poultry production offers agricultural
24 producers an additional source of income with the
25 added benefit that poultry litter is an excellent

1 fertilizer resulting in pastures that can support
2 additional head of cattle."

3 Now, it's an additional source of income why,
4 because they can sell it? Or is it an additional
5 source of income because it enables them to support
6 additional heads of cattle or both?

7 A. I think that it can be interpreted either way
8 to be both. There is the potential that they could
9 sell the litter and it also provides them the
10 opportunity to raise additional cattle.

11 Q. And both of those are true.

12 Do you know the difference between the number
13 of animal units that can be carried on fertilized
14 pasture as opposed to unfertilized pasture in this
15 watershed? Is that outside your area of knowledge?

16 A. That's outside my area of knowledge.

17 Q. Well, you didn't look a lot like a farmer.

18 A. Well, there would be somebody else that could
19 better discuss that than I could.

20 Q. If we could look down at page -- page 7 -- or
21 page 6 of your report, page 6, there's a photograph
22 there. Beneath that photograph, which shows a lush
23 pasture, your last sentence is -- you restate the same
24 thing. This is the figure that you were talking
25 about, this is an example, the additional pasture that

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15 TYSON FOODS, INC., et al.,)
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17)
18 Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
OCTOBER 22, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME XXVII, A.M. SESSION

APPEARANCES:

21	For the Plaintiffs:	MR. W.A. DREW EDMONDSON Attorney General
22		MS. KELLY FOSTER Assistant Attorney General
23		State of Oklahoma 313 N.E. 21st St. Oklahoma City, OK 73105

1 Q. They are sometimes referred to as investors?

2 A. Yes, sir.

3 Q. George's actually operates that farm for them?

4 A. That is correct.

5 Q. And as COO, you had direct oversight over the
6 corporate farms?

7 A. Yes, the company operated those farms.

8 Q. And people who were operating them were somewhere in
9 a reporting line directly under you?

10 A. That would be correct.

11 Q. You also had oversight generally over the
12 contracting grower operations. We'll get into the
13 details, but -- let me rephrase.

14 The production of birds on the contracting
15 farms, those were generally under your title as COO,
16 right?

17 A. Those are independent contractors, but those
18 contractors did grow chickens for George's, Inc., so I
19 would assume that you would look at it that we had
20 responsibility for the chickens.

21 Q. I'm just trying to be sure -- just make clear for
22 the record that under your title as COO, producing the
23 birds on contractor farms was one of the things under
24 you.

25 A. Production would have come under me, yes.

1 Q. Let's talk about sort of the distribution of these
2 various facilities. And we're talking in the terms of
3 the IRW. George's has George's company-operated farms.
4 Are those in Oklahoma or Arkansas?

5 A. All of the company-operated farms are in Arkansas.

6 Q. What about the contract growers?

7 A. Of the contract growers, there are 27 farms, 27
8 broiler farms, three of those farms are in Oklahoma. The
9 remainder are in Arkansas.

10 Q. So George's -- overwhelmingly, George's birds are
11 produced in Arkansas?

12 A. Yes, sir.

13 THE COURT: When you say 27 broiler farms and
14 three in Oklahoma, you're saying 24 in Arkansas are in
15 the IRW?

16 THE WITNESS: Yes, sir.

17 THE COURT: All right.

18 Q. (By Mr. Bullock) As for your corporate-operated
19 farms, George's has always taken responsibility for
20 disposing of the waste from those farms, correct?

21 A. Yes. We have responsibility for managing the litter
22 from those farms.

23 Q. And you leave it to the growers to do that on the
24 contract farms?

25 A. The growers own the litter on the independent

1 contract farms, yes.

2 Q. We'll get more into the contract itself, but the
3 contract doesn't transfer the waste from the birds to the
4 grower, does it?

5 A. The litter from the contract farms is owned by the
6 grower.

7 Q. Well, but --

8 A. And the contract does not transfer --

9 Q. Okay.

10 A. -- either.

11 Q. It doesn't speak either way to that issue?

12 A. No.

13 Q. Now, in terms of this mix between Oklahoma and
14 Arkansas of your production facilities, did that evolve
15 over your 15 years with the company?

16 A. I'm not sure how that -- over the total evolution of
17 that, Mr. Bullock, I think those three growers were
18 probably in existence in Oklahoma when I came with the
19 company. And those remaining contract farms, most of
20 those would have been there when I came with the company.

21 Q. And so over the time that you've been there, not as
22 to specific numbers, but just generally, George's has
23 primarily operated in Arkansas with some presence in
24 Oklahoma?

25 A. Yes.

1 applied to the words that are in that sentence.

2 THE COURT: Sustained. Rephrase, please.

3 Q. (By Mr. Bullock) Well, let's not refer to this.

4 Let's -- let me just ask you in terms of the company.

5 The company expected that the grower would implement the
6 recommendations of the service tech, didn't they?

7 A. The company would expect that the grower would use
8 his best efforts to take care of the birds. The service
9 tech's recommendations are just that: They are
10 recommendations. He is an independent grower,
11 independent contractor. And the service tech is trained
12 to tell him the best methods for growing chickens, the
13 methods that have proven to produce the best, low-cost
14 chicken, the best chicken at the best cost.

15 So those recommendations are guidelines
16 basically that are given by the service tech for him to
17 follow. But they are just that: They're
18 recommendations.

19 Q. Well, he's supposed to use his very best efforts to
20 follow those, isn't he?

21 A. Well, he's supposed to use his very best efforts to
22 grow a chicken.

23 MR. WEEKS: Objection, Your Honor, we're right
24 back where we were previously.

25 THE COURT: Sustained.

1 Q. Well, when you arrived at George's and looked at
2 their operations, you didn't find that George's, in this
3 area, was doing anything else with litter than what had
4 normally been done with it, did you?

5 A. I did not observe that, no.

6 Q. The general practice has been to spread this on the
7 fields, as you say, for fertilizer?

8 A. Yes, sir.

9 Q. George's has begun hauling waste from its
10 company-operated farms in recent years, hasn't it?

11 A. Yes.

12 Q. And by "hauling," I mean actually moving it out of
13 the watershed.

14 A. Yes, sir.

15 Q. When did that practice begin?

16 A. We started removing the litter from our
17 company-operated farms about mid-'03 and taking that
18 litter out of the watershed.

19 Q. As for your contract growers, are you transporting
20 that out of the watershed?

21 A. George's is not. George's does not own that
22 litter. Some of the growers, as I understand, do take it
23 out. And then BMPs, another group, is hauling some of
24 that litter out of the watershed.

25 Q. Is it still the general practice, though, for that

Terri Beeler, RMR, FCRR

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Tulsa, OK 74103 * 918-699-4877

IN THE UNITED STATES DISTRICT COURT
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Defendants.)	

VOLUME XXXII - PM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 3, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 Q. Okay. You were asked by Mr. Bullock a series
2 of questions about Tyson's relationships with contract
3 growers. You're familiar with that term, "contract
4 growers"?

5 A. Yes, I am.

6 Q. Does Tyson consider contract growers to be
7 employees?

8 A. No, we do not.

9 Q. How would you describe the relationship
10 between Tyson and contract growers?

11 A. Contract growers and Tyson enter into an
12 agreement to grow chickens. Basically, the way that
13 works is, Tyson provides the chickens and the feed and
14 the advice to do so. The grower provides a house,
15 labor, and they're basically a caretaker for a given
16 amount of time until the birds reach a desired weight
17 and then Tyson will come and pick those birds up.

18 Q. Does Tyson withhold or pay employment taxes
19 for contract growers?

20 A. No.

21 Q. You were presented with some contracts. I
22 don't know that one of the terms that was explored
23 directly was the length of the term of contracts.

24 Could you provide the court with some context
25 or information as to today the typical length of a

1 evaporative cooling system of these houses. That's
2 some, I guess, good examples.

3 Q. Dr. Pilkington, are you aware of any instance
4 in which a grower has been terminated for failing to
5 follow a service tech's advice that did not involve
6 the endangerment of the health of the birds?

7 A. No, I'm not.

8 Q. Now, if a contract grower is using part of
9 his land or farm to raise cattle or grow hay or other
10 crops, in addition to raising poultry, do service
11 techs give advice or suggestions on those parts of the
12 farm?

13 A. No. They're not trained to do that.

14 Q. Dr. Pilkington, does Tyson spread or
15 land-apply litter in the Illinois River Watershed?

16 A. No.

17 Q. How many litter-spreading trucks does Tyson
18 own?

19 A. None.

20 Q. Do the service techs that visit these farms
21 monitor or give advice on the land application of
22 poultry litter?

23 A. No.

24 Q. When poultry litter is sold by a contract
25 grower to a third party, does Tyson receive the

1 proceeds of that sale?

2 A. No.

3 Q. Does Tyson tell poultry farmers where to
4 spread or land-apply poultry litter?

5 A. No.

6 Q. Does Tyson tell poultry farmers when to
7 spread or land-apply poultry litter?

8 A. No.

9 Q. What about the quantity; does Tyson tell
10 poultry farmers the amount of litter that should be
11 applied to a particular property?

12 A. No, it doesn't.

13 Q. Now, you were asked a question or two about
14 the cleaning out of a poultry house.

15 Does Tyson tell farmers when to clean out
16 poultry houses?

17 A. No.

18 MR. GEORGE: May I approach, Your Honor?

19 THE COURT: You may. Now, the answer to
20 that question surprises me. Because I thought it had
21 been testified that when moisture content gets so
22 great or the condition becomes such, that sometimes
23 these service techs will advise that the house needs
24 to be cleaned out or cleaned out before a new batch of
25 chicks are brought in. Is that not the case?

1 A. Bryan Burns.

2 Q. Okay. And who is Bryan Burns?

3 A. He's in-house counsel for Tyson.

4 Q. And could you, for the record, explain how it
5 is that you came to be in a vehicle with Mr. Burns
6 driving through the watershed and took these
7 photographs?

8 A. Yes. I was scheduled to testify at the
9 preliminary injunction hearing in this matter, and it
10 was -- I needed to refamiliarize myself with the
11 watershed and some of the farms and whatnot around it,
12 so we got in a car and drove around.

13 Q. Okay. Was it raining during the time you
14 were driving or shortly before?

15 A. Yes.

16 Q. Had it rained heavily?

17 A. Yes, it had.

18 Q. Dr. Pilkington, do you still have in front of
19 you some of the contracts that Mr. Bullock discussed
20 with you?

21 A. I do.

22 Q. Can you find what is Oklahoma Exhibit 6564-A,
23 which is a broiler production contract?

24 A. Yes, I have it.

25 Q. Just for the record, could you read clause

1 (7) of the contract?

2 A. Independent contractor?

3 Q. Yes, sir.

4 A. "Producer is engaged in and is exercising
5 independent employment. Producer is an independent
6 contractor and may join any organization or
7 association of producer's choice. Producer is not a
8 partner, agent, or employee of, or joint venturer
9 with, company."

10 Q. Dr. Pilkington, during your involvement with
11 contracts at Tyson Foods, does a producer have the
12 right generally to terminate a contract?

13 A. Yes.

14 Q. Okay. And could you, for the record, in the
15 same contract go to paragraph (9), which is duration,
16 and read it into the record, please?

17 A. Yes. "The terms and conditions of this
18 contract will begin on May 22, '06, and unless
19 terminated by producer, or company, shall conclude on
20 May 22, '09, the scheduled conclusion. If producer is
21 housing company's chickens on the scheduled
22 conclusion, the duration of this contract shall
23 further extend until broilers at producer's facility
24 are picked up by company."

25 Q. And do you agree, or is it your

1 understanding, Dr. Pilkington, that under that
2 provision either the company or the producer can
3 terminate the contract?

4 A. Yes.

5 Q. Could you find Oklahoma Exhibit 6564-B in
6 your materials, which is a contract with a revision
7 date of 12/96?

8 A. Yes, I have that.

9 Q. And once again, do you see a recognition in
10 the contract language itself of the independent
11 contractor nature of the relationship?

12 A. Yes. In paragraph (6).

13 Q. And could you read that into the record,
14 please?

15 A. "It is understood that the producer is
16 engaged in and is exercising independent employment.
17 The producer is an independent contractor and is not a
18 partner, agent, or employee of the company. Producers
19 may join or assist any organization or association of
20 their choice with no effect on this contract in any
21 way."

22 Q. Dr. Pilkington, in this contract that we're
23 looking at, is there a provision, as there was in the
24 earlier or the more recent version, allowing the
25 producer to terminate the contract?

1 A. Yes.

2 Q. Okay. And what, for the record, provision is
3 that?

4 A. Paragraph -- paragraph (18).

5 Q. Thank you. Last one that I'll explore with
6 you, Dr. Pilkington. If you can look at Oklahoma
7 Exhibit 6564-C.

8 A. Yes.

9 Q. Which for the record is the contract with a
10 revision date -- I think it's 11/92.

11 Once again, is there a provision recognizing
12 the grower as an independent contractor in this
13 agreement?

14 A. Yes. It's paragraph (6).

15 Q. Okay. Dr. Pilkington, you were asked about
16 and shown a couple of photos of signs that have -- for
17 a contract grower's farm that has a Tyson logo on it.
18 Do you recall that?

19 A. Right.

20 Q. What is the rationale for placing a Tyson
21 logo on a farm that is owned and operated by a
22 contract grower?

23 A. The biggest reason is so our feed trucks know
24 that it's our farm. I know this is -- is maybe
25 amazing to some, but there are cases where our feed

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME XXXIV - PM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 4, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 A. They have increased some.

2 Q. All right. When did you begin with Green
3 Country Farms and Mr. Butler?

4 A. My work with them began in February of 2004.

5 Q. The birds that are located within those
6 houses that -- well, let me ask it this way.

7 Is part of your duties to oversee the
8 operations of those bird-growing facilities?

9 A. Somewhat. I'm kind of a manager over a
10 couple of guys that do supervise those growing
11 operations.

12 Q. Are you familiar with the operations as a
13 result of your position and responsibilities?

14 A. Yes.

15 Q. All right. The poultry litter or waste
16 that's generated from those barns, what happens to it?

17 A. The poultry litter that's generated there is
18 all exported out of the Illinois River Watershed.

19 Q. Does Mr. Butler or does Green Country hire
20 contractors to haul that waste?

21 A. Yes, we do.

22 Q. And has that waste been hauled the entire
23 time that you've been there?

24 A. Yes, it has.

25 Q. Has, at any time that you've been there since

1 March of '04, any of that waste been land-applied?

2 A. I believe it has, yes.

3 Q. All right. And when it's hauled away, do you
4 know where it goes?

5 A. No, I don't, not specifically.

6 Q. Do you know for a fact it goes outside the
7 Illinois River Watershed?

8 A. I know for a fact that since -- I believe it
9 was late May of 2005, that 100 percent of the litter
10 has been hauled outside of the Illinois River
11 Watershed.

12 Q. Let's talk about you and your experience as
13 being a poultry-grower. You have an operation at this
14 time?

15 A. Yes, I do.

16 Q. And who is the integrator for which you grow
17 birds?

18 A. Tyson.

19 Q. And when did you start with Tyson?

20 A. April of 2004, I believe.

21 Q. All right. Did you have poultry-growing
22 operations with an integrator prior to Tyson?

23 A. Yes.

24 Q. And who was that integrator?

25 A. Peterson Farms.

1 Q. So what do you do with the waste that you do
2 not land-apply on your property?

3 A. I'm sorry. Could you ask that --

4 Q. Yeah. What do you do with the poultry litter
5 that has not been land-applied on your property?

6 A. I sell it.

7 Q. And do you sell it to neighbors?

8 A. Generally -- I have sold it to neighbors in
9 the past.

10 Q. And when you sold it to a neighbor in the
11 past, what would they do with it?

12 A. They would land-apply it as fertilizer.

13 Q. Do you have a regular customer today that
14 you're selling to?

15 A. Not a regular customer, no.

16 Q. All right. And so when you do sell it, is it
17 still being land-applied, as far as you know?

18 A. I have no idea. I --

19 Q. Well, when you sell it to a neighbor, you
20 have an idea, don't you?

21 A. Yes.

22 Q. And it's being land-applied there?

23 A. Yes.

24 Q. Okay. Is there any particular time of year
25 that you do your cleanouts?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME XXXV - AM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 5, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 Q. What is BMP?

2 A. It's my understanding BMP's is a -- I know
3 kind of what they do but I don't know exactly what
4 you --

5 Q. I'm sorry. Tell us what they do, as you
6 understand it.

7 A. As I understand, they work similar to a
8 broker, a brokerage firm, that assists growers in
9 selling litter to be removed from the -- any
10 nutrient-limited or vulnerable watersheds.

11 Q. And did you, in fact, sell your litter to
12 BMP's in September of 2006?

13 A. I sold my litter through BMP, yes.

14 Q. Okay. And did you receive money for that
15 litter?

16 A. Yes, I did.

17 Q. And did you retain that money or did you send
18 it to Tyson Foods?

19 A. I retained that.

20 Q. Is the money that you receive when you sell
21 your litter important to you in subsidizing the
22 operation of your farm?

23 A. Absolutely.

24 Q. Will you turn and find Oklahoma Exhibit 4061,
25 Mr. Pigeon? For the record, it's an Animal Waste

1 Q. Okay. Mr. Pigeon, after receiving this plan
2 in November of 2006 with that instruction, have you
3 applied litter to any of those three fields?

4 A. No, I have not.

5 Q. So you followed the instructions in this
6 plan?

7 A. Yes.

8 Q. Now, Mr. Pigeon, did you have a bit of a
9 mix-up at some point with the State of Oklahoma or
10 ODAFF regarding some records that you submitted?

11 A. Yes, I did.

12 Q. And could you tell us a little bit about
13 that, please?

14 A. I had inadvertently reported a wrong field
15 number that I had applied litter.

16 Q. Okay. And when you submitted that litter
17 application record, did you receive some
18 correspondence back from the State of Oklahoma?

19 A. Yes, I did.

20 Q. Okay. Could you turn in your exhibits to
21 Oklahoma Exhibit 2875D, which for the record is a
22 collection of three letters, two from the state and
23 one from Mr. Pigeon?

24 Do you have that, Mr. Pigeon?

25 A. Yes, I do.

1 Q. Do you recognize each of those letters?

2 A. Yes, I do recognize those.

3 Q. Okay. And what are the dates of the letters?

4 You can just take them in order.

5 A. February 16th of 2006.

6 Q. And who is that letter from?

7 A. It's from Mr. Dan Parrish.

8 Q. And who is it to?

9 A. It's to Jim and Michelle Pigeon.

10 Q. Do you recall receiving this?

11 A. Yes, I do.

12 Q. And then the second letter?

13 A. That was a letter to Mr. Parrish from myself
14 dated February 21st 2006.

15 Q. And is that your signature?

16 A. Yes, it is.

17 Q. Could you turn to the third letter? What's
18 the date of it?

19 A. The date is March 23rd, 2006.

20 Q. And who is it signed by?

21 A. Mr. Parrish.

22 Q. And who is it to?

23 A. To Jim and Michelle Pigeon.

24 Q. And do you recall receiving that letter from
25 Mr. Parrish?

1 A. Yes, I do.

2 MR. GEORGE: Your Honor, I'd move for
3 introduction of Oklahoma Exhibit 2875D.

4 THE COURT: Any objection?

5 MR. GARREN: Your Honor, there's an
6 extra page in here that I'm trying to make sure
7 whether it's, in fact, included as part of the letter,
8 which is the third page of the document.

9 *(Discussion held off the record)*

10 MR. GARREN: No objection.

11 THE COURT: Exhibit 2875D is admitted.

12 Q. (BY MR. GEORGE) So let's walk through this
13 in a little bit of detail, Mr. Pigeon.

14 Can you go to the February 16, 2006, letter
15 from Mr. Parrish to yourself?

16 A. Yes.

17 MR. GARREN: Your Honor, I would object
18 on this line of questioning because it's certainly
19 outside the scope of direct. I don't know the
20 relevance of it in that sense.

21 MR. GEORGE: Your Honor, if I may, we
22 had an agreement with respect to third parties, such
23 as Mr. Pigeon, that the scope of direct could be
24 exceeded so they wouldn't have to be recalled.

25 MR. GARREN: Now that I know that, I'll

1 withdraw it.

2 THE COURT: Thank you.

3 Q. (BY MR. GEORGE) You dodged a bullet,
4 Mr. Pigeon. We might not have to bring you back.

5 A. Thank you.

6 THE COURT: I've had to drive to and
7 from Concord myself so I don't want to make you do
8 that anymore than you have to.

9 Go ahead.

10 MR. GEORGE: Thank you, Your Honor.

11 Q. (BY MR. GEORGE) Do you see on the February
12 16th, 2006, letter that Mr. Parrish has reviewed -- or
13 somebody in his office has reviewed your reports and
14 has found a discrepancy? Is that a fair description?

15 A. Yes, it is.

16 MR. GARREN: The document's in, Your
17 Honor, it speaks for itself in that sense. So I would
18 object if we're going to sit here and read this entire
19 document.

20 THE COURT: Mr. George, the purpose?

21 MR. GEORGE: Certainly, Your Honor. The
22 purpose is to show that contrary to what's been
23 suggested by the state, that there is actually some
24 oversight of these farms, records are reviewed, and
25 when there are problems noted, procedures are followed

1 to correct those problems.

2 THE COURT: The objection's overruled.
3 I think it's helpful to see how the law's being
4 enforced.

5 Go ahead.

6 MR. GEORGE: Thank you, Your Honor.

7 Q. (BY MR. GEORGE) In paragraph No. 1,
8 Mr. Pigeon, do you see where Mr. Parrish has reported
9 that you had reported eight tons of poultry waste
10 applied to field No. 2?

11 A. Yes.

12 Q. Was that a correct report, or did you make an
13 error? Let me ask it this way.

14 Did you actually apply eight tons of poultry
15 litter to field No. 2 on December the 22nd of 2004?

16 A. No, I did not.

17 Q. And you see in the second paragraph, what
18 does Mr. Parrish say was the phosphorus test index for
19 field No. 2?

20 A. I apologize. Actually, on section No. 1 --

21 Q. Yes, sir.

22 A. -- I may have applied litter on December
23 22nd, 2004.

24 Q. Okay.

25 A. I believe that states that the report did not

1 include a soil test report.

2 Q. I'm sorry. I'm sorry. Okay. Do you see
3 where in the second paragraph Mr. Parrish reports that
4 there's been a violation at your property because
5 litter was applied on field No. 2 and the phosphorus
6 index was 528?

7 A. Yes.

8 Q. Okay. When you received this letter from
9 Mr. Parrish, were you concerned about that?

10 A. Absolutely.

11 Q. And what did you do in response?

12 A. I immediately went to my records.

13 Q. What did you find when you reviewed your
14 records?

15 A. I found that I had inadvertently written the
16 wrong field number down and reported the incorrect
17 field number to the state.

18 Q. Okay. What should have been the correct
19 field number?

20 A. I believe that should have been field No. 3,
21 if I remember correctly.

22 Q. And did you communicate that information back
23 to Mr. Parrish in response to the letter he sent you?

24 A. Yes, I did.

25 Q. Okay. And did you submit a corrected report

1 of your litter application history?

2 A. Yes, I did.

3 Q. And is that the document that's shown as --
4 and it's Bates-numbered at the bottom -- ODAFF,
5 December '07, 004659?

6 A. I believe that's correct, yes.

7 Q. What did Mr. Parrish do in response to your
8 letter, if you know?

9 A. I believe he asked the inspectors, the record
10 inspectors, to come to the farm and collect samples
11 from the fields that I reported in error, soil samples
12 from that field, as well as samples of poultry litter
13 from the houses.

14 Q. Okay. And did someone, in fact, come and
15 collect those samples from your property?

16 A. Yes, they did.

17 Q. And who was that person?

18 A. That was Mr. John Littlefield and Mr. David
19 Berry.

20 Q. Okay. And have you received any information
21 as to the results of those samples?

22 A. Yes, I did.

23 Q. And could you turn to the last letter that's
24 dated March the 23rd of 2006?

25 A. Yes.

1 Q. What was your phosphorus index on field 2
2 when it was resampled by Mr. Littlefield according to
3 this letter?

4 A. According to this letter, the phosphorus
5 level in field No. 2 was 282.

6 Q. Based upon your Animal Waste Management Plan,
7 would you be able to apply on that field if it were
8 282?

9 MR. GARREN: Objection to the form.

10 THE COURT: Overruled. Go ahead.

11 A. Yes, I could.

12 Q. (BY MR. GEORGE) Okay. And could you read
13 for the record the last sentence of Mr. Parrish's
14 letter dated March 23rd, 2006?

15 A. "This situation has been resolved."

16 MR. GEORGE: Your Honor, may I consult?
17 I may be through.

18 THE COURT: Yes, sir.

19 *(Discussion held off the record)*

20 MR. GEORGE: I'll pass the witness, Your
21 Honor.

22 THE COURT: Peterson?

23 MR. HIXON: Peterson Farms has nothing
24 for the witness.

25 THE COURT: Anyone else? Mr. Garren.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
)
Plaintiffs,)
)
vs.) CASE NO. 05-CV-329-GKF-PJC
)
)
TYSON FOODS, INC., et al.,)
)
)
Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 5, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME XXXVI, P.M. SESSION

APPEARANCES:

For the Plaintiffs: MR. W.A. DREW EDMONDSON
Attorney General
MS. KELLY FOSTER
Assistant Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105

1 A. Yes.

2 Q. What was it?

3 A. It was a -- worked for a pipeline company for 23
4 years in Tulsa.

5 Q. Was that MAPCO?

6 A. Yes.

7 Q. Since growing poultry, have you obtained licenses
8 with the State of Oklahoma regarding poultry operations
9 or the land application of poultry waste?

10 A. Yeah, I'm a commercial applicator.

11 Q. You have a license with the State to do that?

12 A. Yes.

13 Q. When did you first become a commercial applicator?

14 A. I'm not sure. It's been six or seven years ago.

15 Q. Do you have a partner or person that you work with
16 in the commercial application business?

17 A. I don't anymore.

18 Q. Did you in the past?

19 A. Yes.

20 Q. What was his name?

21 A. Mike Langley.

22 Q. Are any other businesses that you operate today from
23 the residence location you gave us?

24 A. Yes.

25 Q. What is that?

Terri Beeler, RMR, FCRR

United States Court Reporter
333 W. 4th St.

Tulsa, OK 74103 * 918-699-4877

1 A. Greener Pastures Enterprises.

2 Q. What is that?

3 A. It's a full-service cleanout business. I take care
4 of the cleaning out the chicken houses, putting bedding
5 back in, so on and so forth, throughout the area.

6 Q. Do you supply the bedding when you do that work?

7 A. If they want me to.

8 Q. Are you paid for the service of cleaning out the
9 barn?

10 A. No.

11 Q. What do you get in return for cleaning out the barn?

12 A. I get the litter.

13 Q. What do you do with the litter when you get it?

14 A. I market it, sell it, move it, sometimes even spread
15 it.

16 Q. Do you have a facility to store it in?

17 A. Some.

18 Q. Do you typically store or do you typically land
19 apply it upon cleanout?

20 A. What are you talking about?

21 Q. Poultry litter that you remove from barns --

22 A. Yeah.

23 Q. -- do you typically store it, or do you simply go
24 from the barns directly to an application site and land
25 apply it?

1 the vicinity of the barn?

2 A. Yes.

3 Q. Okay. And when you piled it, how long would it stay
4 there generally?

5 A. Not very long.

6 Q. Would you cover it?

7 A. Just depends on how long it was going to be there.

8 Q. Sometimes you wouldn't; is that what you're saying?

9 A. Yeah. Depending on the weather forecast, whatever.

10 Q. Did you, sir, land apply on your 205 acres all the
11 waste that was generated in your three houses when you
12 were growing?

13 A. No.

14 Q. What else would you do with it if you didn't land
15 apply your land?

16 A. I would sell it, sell the litter.

17 Q. When you sold it, did you transport it to whoever
18 was buying it?

19 A. Sometimes, yeah.

20 Q. And sometimes what else would happen?

21 A. Or we'd load it on a semi and haul it off.

22 Q. When you transported it, how far would you generally
23 go when you would sell it and transport it?

24 A. As much as five miles away.

25 Q. On average, during the approximate ten years that

Terri Beeler, RMR, FCRR

United States Court Reporter
333 W. 4th St.

Tulsa, OK 74103 * 918-699-4877

1 and your litter hauling business as it is today and some
2 other similar questions. So I think this will be brief
3 and I think it will go quickly.

4 Let's start with your relationship with Simmons
5 when you were growing birds for Simmons Foods. Did you
6 get a 1099 every year from Simmons? You know what a 1099
7 is?

8 A. Yes. Yes.

9 Q. And you were not a W-2 employee; is that correct?

10 A. No.

11 Q. Would you have wanted to be a -- an employee of
12 Simmons Foods?

13 MR. GARREN: Objection, Your Honor, relevance.

14 THE COURT: Sustained.

15 Q. (By Mr. Elrod) Do you consider yourself to be an
16 independent contractor with Simmons Foods when you were
17 growing birds for them, sir?

18 MR. GARREN: Objection. Calls for a legal
19 conclusion.

20 THE COURT: Overruled.

21 THE WITNESS: Repeat the question.

22 Q. (By Mr. Elrod) Did you consider yourself to be an
23 independent contractor when you were growing birds for
24 Simmons?

25 A. Yes.

1 Q. Were you your own boss?

2 A. Yes.

3 Q. Had your own farming operation?

4 A. Yes.

5 Q. Did either you or your wife, as we say, "work off
6 the farm," during that period of time that you were
7 growing birds for Simmons?

8 A. My wife might have.

9 Q. You have four children?

10 A. Two.

11 Q. Two children. And what are their approximate ages
12 today?

13 A. Ashley is 18. Jake is 21.

14 Q. So when you moved from MAPCO to -- and purchased
15 your farm near Westville, Oklahoma in about 1995, they
16 were pups, correct?

17 A. They were young.

18 Q. You've raised those kids and supported your family
19 for a period of maybe ten years while you were raising
20 birds for Simmons; is that true?

21 MR. GARREN: Objection, relevance.

22 MR. ELROD: Goes to the agency issue,
23 Your Honor.

24 THE COURT: Overruled.

25 THE WITNESS: Repeat the question.

Terri Beeler, RMR, FCRR

United States Court Reporter
333 W. 4th St.
Tulsa, OK 74103 * 918-699-4877

1 Q. Now, do you drink well water at your place?

2 A. I have.

3 Q. Have for years?

4 A. Yeah.

5 Q. No chlorination?

6 A. No chlorination.

7 Q. Tell His Honor, please -- let's talk about your
8 present spreading and hauling operation. Has the
9 sophistication of your equipment gotten better over the
10 years?

11 A. Dramatically.

12 Q. Dramatically?

13 A. Yes.

14 Q. How many trucks do you run today?

15 A. We have five full-time semis hauling chicken litter
16 mainly from the Illinois River Watershed.

17 Q. And is most of your work being done in conjunction
18 with BMPs, Inc.?

19 A. Some.

20 Q. And so you do hauling work outside of the watershed,
21 hauling litter from inside to outside independent of
22 BMPs, Incorporated?

23 A. Yes.

24 Q. How do you make those contacts, both on the buying
25 end and selling end?

1 A. Mostly word of mouth. I do a lot of advertising.

2 Q. Okay. Now, this is not yet a mature business; isn't
3 that true? I mean in the sense it is still developing.

4 A. It's developing.

5 Q. And you know Sheri Herron?

6 A. Yes.

7 Q. Has she helped you develop markets for litter
8 outside of the watershed?

9 A. Yes, she has.

10 Q. Sounds to me like you've developed your own markets
11 outside of the watershed; is that true?

12 A. More than what I've gotten from help from her.

13 Q. Tell His Honor the distance that you will sometimes
14 haul and the major towns and the area to which you will
15 haul outside of the watershed.

16 A. We've got an area called Enid, Oklahoma, which is
17 200 miles west. We'll haul north into Kansas 125 miles
18 or more. We've been as far as Stuttgart, Arkansas,
19 central Arkansas on the other side of Little Rock.

20 Q. Rice country?

21 A. Rice country.

22 Q. Let me interrupt you for a second. When you haul to
23 Stuttgart, do you haul rice hulls back?

24 A. No.

25 Q. Go ahead.

1 A. And we've been as far south as the Texas line in
2 Oklahoma, so I think you could say a 200-mile radius of
3 the area.

4 Q. Now, I hope and assume that business is profitable
5 to you.

6 A. Profitable?

7 Q. Yes, sir.

8 A. Yes.

9 Q. And I mean in the sense that you make some money.

10 A. Yes.

11 Q. Are you able to pay for your equipment?

12 A. The bank has a lot of it, yeah.

13 Q. That's something that I'm very familiar with, sir.

14 A. Yes.

15 Q. These semi trucks, are they what we call live bed
16 trucks?

17 A. Yes.

18 Q. What does that mean?

19 A. It means that when we unload, we can -- the bottom
20 actually moves, and -- they don't dump. I mean they
21 don't end dump. They just come out -- the back end
22 raises up and it comes out the back end.

23 Q. What kind of agricultural enterprises are your end
24 users involved with?

25 MR. GARREN: Objection, relevance, Your Honor.

1 tell us in your own words what you're required to know
2 and to look at for a specific application.

3 A. Well, we're looking at the amount of phosphorus.
4 That's the only thing that's relevant in this case right
5 now. That's one of the main things that we look at is
6 the amount of phosphorus in the litter, the pounds per
7 ton versus the amount of -- we don't overspread, because
8 we have learned that less is just as good as more in
9 years past.

10 So just because it says that we can -- we're
11 allowed to go up to 300 doesn't mean we go up to 300 on
12 our index just so we can max it out every time. The cost
13 of the litter has elevated to the point where the
14 consumer is very conscious to make his operation cash
15 flow and so, therefore, he doesn't want to put any more
16 on there than what he has to put on there to make his
17 grass grow or his crops grow or whatever. So I hope I've
18 answered your question, or if you need some more, I
19 can...

20 Q. Well, just, you know, commercial fertilizer is
21 expensive this day and age, too, correct?

22 A. It is.

23 Q. So is it true, sir, that the value of the litter --
24 of the chicken litter tends to rise as the cost of its
25 competitor, commercial fertilizer, rises?

1 Peterson?

2 A. Yes. Most of my dad's career was with Peterson,
3 yes.

4 Q. What did -- what happened to the poultry waste
5 generated by the chickens on your family farm?

6 A. We spread it on the land.

7 Q. On your own pastures?

8 A. Yes.

9 Q. So you used the poultry litter from your poultry
10 operation to help grow pasture grass for the cows to
11 graze?

12 A. Pasture and hay, yes, sir.

13 Q. And hay. So the two activities do complement each
14 other, correct --

15 A. Yes, sir.

16 Q. -- in your experience?

17 The poultry waste nutrients grow more grass for
18 the cows to graze?

19 A. Yes.

20 Q. Would you say, based on your almost 30 years with
21 Peterson Farms and the lifetime farming yourself in this
22 area with both poultry and cattle, that most people who
23 do raise poultry also raise some cows?

24 A. It would be hard to say. Depending on the size
25 acreage they've got whether they could do that or not.

1 Q. Historically, did many people who raised poultry
2 also raise cows?

3 A. Yes.

4 Q. And wasn't it the general practice while you were at
5 Peterson that poultry growers either land applied litter
6 on their own pastures or transferred it to their
7 neighbors, who land applied it on theirs?

8 A. That was my perception, yeah.

9 Q. During the time you were president and chief
10 operating officer at Peterson Farms, there was not an
11 organized effort to haul poultry litter out of the
12 Illinois River Watershed, was there?

13 A. I don't think so.

14 Q. Sir, what element or constituent in poultry waste is
15 the one that increases grass yield?

16 MR. LONGWELL: Objection, Your Honor. I'm not
17 sure he's laid the foundation with this witness for this
18 witness to answer this question.

19 THE COURT: This man has lived on the farm for
20 62 years. Overruled.

21 You can answer the question.

22 THE WITNESS: The main constituent used to be
23 nitrate, nitrogen. But in recent years, phosphorus has
24 kind of reared its head.

25 Q. (By Mr. Riggs) But historically, most poultry

1 Q. Okay. And do you know the phrase "a
2 grandparent operation"?

3 A. Do what?

4 Q. Do you know the phrase "a grandparent
5 operation"? Let me say it a different way.

6 Do you know what a layer is?

7 A. Yes.

8 Q. And do you raise layers?

9 A. Yes.

10 Q. What's a layer?

11 A. It's one that produces eggs for the broilers
12 to be processed.

13 Q. Okay. So you're not raising meat chickens,
14 are you?

15 A. No.

16 Q. You're raising the chickens that are the
17 parents of the chickens that become meat; right?

18 A. Yes.

19 Q. Are you an employee of Cobb-Vantress?

20 A. No.

21 Q. Do you own your own farm?

22 A. Yes.

23 Q. How long has it been that way?

24 A. From the start.

25 Q. Now, I heard Mr. Garren ask if Cobb leases

1 Q. Who hired them?

2 A. I do.

3 Q. Who supervises them?

4 A. I do.

5 Q. Who is the boss on your farm?

6 A. Me.

7 Q. Are you retired, sir?

8 A. Sir?

9 Q. Are you retired?

10 A. Yes.

11 Q. How long have you been retired?

12 A. Oh, ten years.

13 Q. Now, I just want to clarify something,
14 Mr. Anderson.

15 You and I met this morning, didn't we?

16 A. Yes.

17 Q. And I showed you the first page of the
18 documents that I thought the state might show you. Do
19 you remember that?

20 A. Yes.

21 Q. We didn't read them all the way through, did
22 we?

23 A. Right.

24 Q. Mr. Anderson, to your knowledge, who owns the
25 litter created on your farm?

1 MR. GARREN: Objection, Your Honor.

2 A. I do.

3 MR. GARREN: Calls for a legal
4 conclusion.

5 THE COURT: Overruled. It's ultimately
6 for the court to determine.

7 Go ahead.

8 Q. (BY MR. JORGENSEN) Can you repeat your
9 answer, Mr. Anderson?

10 A. I do.

11 Q. Has it always been that way?

12 A. Yes.

13 Q. How do you know that you own the litter?

14 A. Well, when we first started, Mr. Jones was
15 the president of Cobb's, and that's one reason I built
16 the houses was for the litter.

17 Q. When you say it was one of the reasons you
18 built the houses, you wanted the litter --

19 A. Sure.

20 Q. -- what do you mean by that?

21 A. I wanted to, you know, apply it to my land.
22 Because since I've started doing that, I can run twice
23 as many cattle as I did before.

24 Q. Is that because the litter makes the grass
25 grow?

1 A. Yes.

2 Q. Okay. And were you raising cattle before you
3 got into chickens?

4 A. Yes.

5 Q. Okay. Now, do you drink from a well on your
6 property?

7 A. I drank water from a spring for 70 years.

8 Q. Okay. That was going to be my next
9 questions, how long.

10 Have you ever gotten sick from drinking the
11 water from the spring?

12 A. No.

13 Q. Has anybody in your family ever gotten
14 sick?

15 A. No.

16 Q. Have you ever had your spring tested?

17 A. Yes.

18 Q. What were the results of the test?

19 MR. GARREN: Objection, Your Honor.
20 It's hearsay, lack of foundation for the testing.

21 THE COURT: Sustained.

22 Q. (BY MR. JORGENSEN) Okay. Let's move on,
23 Mr. Anderson.

24 Do you remember, Mr. Anderson, that the state
25 showed you something called Exhibit 6470? And I'm

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	CASE NO. 05-CV-329-GKF-PJC
)	
)	
TYSON FOODS, INC., et al.,)	
)	
)	
Defendants.)	

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 9, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME XXXVIII, P.M. SESSION

APPEARANCES:

For the Plaintiffs:	MR. W.A. DREW EDMONDSON
	Attorney General
	MS. KELLY FOSTER
	Assistant Attorney General
	State of Oklahoma
	313 N.E. 21st St.
	Oklahoma City, OK 73105

1 question of whether that grower is in the area that it is
2 best for you to service them, right?

3 A. That would be one of several factors.

4 Q. Do you look at the question of whether the grower
5 has an appropriate place to deal with the waste that you
6 know your birds will produce?

7 A. Or an alternate plan that is appropriate for the
8 poultry litter.

9 Q. Well, that's --

10 A. It might be on his property or neighbor's property
11 or he might plan to sell it some other place that's
12 appropriate.

13 Q. The question is: Before you contract with the
14 grower, do you look to see whether he has an appropriate
15 way of disposing of the waste that your birds will
16 produce?

17 A. Before we will finalize a contract, they have to
18 agree that they will have that.

19 Q. That they will obey the law, correct?

20 A. That's correct.

21 Q. But you don't look at the question of whether they
22 have a place which is appropriate, do you?

23 A. Not a place.

24 Q. Let's talk about the feed conversion. You testified
25 to counsel that that -- that the feed conversion is

1 Simmons to some of our coconspirators over here?

2 A. Yes, sir.

3 Q. And was that partially a result of the upgrade
4 requirement that you had when you went total hundred
5 percent tunnel houses?

6 A. Part of it was, yes, sir.

7 Q. Mr. Murphy, I have a series of 14 stock questions
8 for you similar to the ones that have been asked on the
9 other side, then I'm through. Does Simmons tell its
10 growers where to apply litter?

11 A. No, sir.

12 Q. Does Simmons tell its growers when to apply litter?

13 A. No, sir.

14 Q. Does Simmons tell its growers how much of its litter
15 to apply?

16 A. No, sir.

17 Q. And when the grower sells litter, who gets the
18 money?

19 A. The grower does.

20 Q. And who pays for the supplies and the bedding?

21 A. The grower does.

22 Q. And who owns the land on which the chicken houses
23 are built?

24 A. The grower.

25 Q. Who pays for the maintenance of those houses?

1 A. The grower.

2 Q. Who pays the utilities for those houses?

3 A. The grower.

4 Q. Who pays for the equipment in the house?

5 A. Grower.

6 Q. Who supplies the labor?

7 A. The grower.

8 Q. Who makes the professional judgment about the

9 specific practices to be implemented at the farm?

10 A. The grower does.

11 Q. Is it common for a grower to hire help?

12 A. Yes, sir.

13 Q. And if a grower does hire help, who pays for that

14 help?

15 A. The grower does.

16 Q. Does the grower get a 1099?

17 A. Yes, sir.

18 Q. And does Simmons deduct any taxes or insurance from

19 a grower's check?

20 A. No, sir.

21 Q. Does Simmons consider the growers to be independent

22 contractors?

23 A. They do.

24 Q. In fact, the contract says that; is that correct,

25 sir?

1 A. That's correct.

2 Q. Those are my questions. Thank you.

3 THE COURT: Any other defendants have
4 questions?

5 MR. VOLPE: Nothing, Your Honor.

6 MS. LONGWELL: No, Your Honor.

7 MR. REDEMANN: No, Your Honor.

8 THE COURT: Mr. Garren.

9 MR. GARREN: I have a couple. We'll get out of
10 here by five for sure.

11 REDIRECT EXAMINATION

12 BY MR. GARREN:

13 Q. You said, sir, that Simmons doesn't tell its growers
14 when to apply. In fact, Simmons does tell them when to
15 clean out, doesn't it?

16 A. We suggest it from time to time, yes, sir.

17 Q. You would agree with me that when we looked at the
18 contracts earlier, it says under what the grower will do,
19 it will comply with the instructions of the care, feeding
20 and management of the flock given by Simmons anytime
21 during the term of this agreement, correct?

22 A. That's correct.

23 Q. So to the extent that this professional judgment
24 that might be exercised is not in compliance with the
25 instructions, care and feeding as instructed by Simmons,

1 Q. Well, what I'm trying to find out is when they --
2 when George's was growing, when it actually owned the
3 birds that were being raised.

4 A. I don't know what that date was.

5 Q. Okay. Is poultry waste generated by George's birds
6 land applied in the IRW?

7 A. You're saying poultry waste, but you're referring to
8 poultry litter.

9 Q. Well, we can use litter. I'm sure the Court has low
10 tolerance for that at this point.

11 THE COURT: It's used interchangeably in this
12 trial.

13 THE WITNESS: I'm sorry, ask the question again.

14 Q. (By Mr. Bullock) Okay. Has the poultry litter on
15 which George's birds have been grown, has it been spread
16 in the IRW?

17 A. In the past, it has.

18 Q. Okay. Well, today George's -- Mr. Henderson's
19 testimony, as I recall, was that today George's hauls out
20 all of the waste from its corporately managed or owned
21 farms, correct?

22 A. That is correct.

23 Q. But there's another side of the business where you
24 have the contract growers, and that waste is not
25 routinely hauled out, is it?

1 A. A good portion of it is.

2 Q. How much? What is that portion today?

3 A. I don't know exactly what that percentage is, but
4 BMPs, Inc. hauls out a lot of the litter from our
5 contract farms.

6 Q. Do you don't know how much?

7 A. Today, I don't know exactly what that percentage is.

8 Q. Do you know how long that has been going on?

9 A. Since '03, '04. Probably '04.

10 Q. Again, you do not know what the percentages were,
11 though, for any of those years since then?

12 A. No.

13 Q. Okay. It is true that waste -- previous to the
14 haul-out program at George's, waste was actually hauled
15 from some of your corporate-run facilities to be land
16 applied in the Oklahoma portion of the IRW; isn't that
17 true?

18 A. Some of it was, yes.

19 Q. George's actually bought land in Oklahoma for the
20 purpose of using it -- or for the purpose of spreading
21 its waste on that land?

22 A. I don't know that that's the purpose that they
23 bought it for, but they did spread some litter on that
24 land.

25 Q. Do you know of any other use to which it was put?

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
3
4 STATE OF OKLAHOMA, ex rel.)
5 W.A. DREW EDMONDSON, in his)
6 capacity as ATTORNEY GENERAL)
7 OF THE STATE OF OKLAHOMA,)
8 et al.)
9)
10 Plaintiffs,)
11)
12 vs.) CASE NO. 05-CV-329-GKF-PJC
13)
14)
15 TYSON FOODS, INC., et al.,)
16)
17)
18 Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 10, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME XXXIX, A.M. SESSION

APPEARANCES:

21	For the Plaintiffs:	MR. W.A. DREW EDMONDSON Attorney General
22		MS. KELLY FOSTER Assistant Attorney General
23		State of Oklahoma 313 N.E. 21st St. Oklahoma City, OK 73105

1 A. I can't say I know if we did or not.

2 Q. If someone wanted to be an egg producer for
3 Cal-Maine, but didn't want the responsibility of dealing
4 with those dead birds, would that have been permitted?

5 A. Probably not. That's part of the contractual
6 agreement.

7 Q. Under your contract with the egg producers, what
8 provisions were made for disposing of the waste which
9 would be produced by Cal-Maine's chickens?

10 A. The waste was owned and was the responsibility of
11 the contractor.

12 Q. Was that a provision in the Cal-Maine contracts of
13 its egg producers?

14 A. Yes, it is.

15 Q. Was that a provision in the contract from the very
16 beginning of your operation in the IRW?

17 A. Yes, sir, and before us even, with those same
18 growers.

19 Q. If someone wanted to be a egg producer for
20 Cal-Maine, but did not want the responsibility of
21 disposing of the waste which would be produced by
22 Cal-Maine's chickens, would Cal-Maine have allowed them
23 to have that provision in their contract?

24 A. No, I don't know that it really has ever come up.
25 Typically one of the benefits of a contractual

1 relationship is that the contract grower wants the manure
2 for their own land for fertilizing purposes.

3 Q. So was most of the waste produced by Cal-Maine's
4 chickens in the IRW spread on the grower's own land in the
5 IRW?

6 A. I have no direct knowledge of that.

7 Q. I thought you just said most would want it for that
8 purpose.

9 A. I did say that. That's why they would contract with
10 us, because they would want it. Was it handled that
11 way? I can't tell you for sure that it was. I don't
12 know exactly what they did with it.

13 Q. So I take it Cal-Maine never made an agreement with
14 any egg producer in the IRW to take responsibility for
15 the waste off the hands of the producer?

16 A. To my knowledge, we never have.

17 Q. Is it true, during the time Cal-Maine operated in
18 the IRW, in order to get a contract as an egg producer
19 for Cal-Maine, the producer had to agree to let the
20 company, in its sole discretion, come in and take over
21 the flock if the company deemed the producer was not
22 caring for the birds properly?

23 A. There is a clause either exactly or similar to that,
24 that if the producer fails to take care of the birds, the
25 company can operate the flock until the end, and then

1 Q. Which may take it to that 65,000 number?

2 A. Right. Yes.

3 Q. When you worked for George's, did you do
4 annual cleanouts of your house?

5 A. Yes.

6 Q. Did they request that you do it that way?

7 A. I don't know that they actually requested it.
8 I just -- I done it every spring.

9 Q. All right. And how often would you cake-out
10 when you worked for George's?

11 A. I did.

12 Q. All right. So you just did an annual
13 cleanout and that was it?

14 A. Yes.

15 Q. Did you land-apply the poultry litter from
16 the George's operations when you were conducting
17 those?

18 A. Yes.

19 Q. And where did you normally land-apply it?

20 A. I applied it to my place, to -- I sold some
21 to my neighbors.

22 Q. Didn't go very far?

23 A. Not at that time, no.

24 Q. Did you use soil tests before land-applying
25 back then when you worked for George's?

1 much you're generating in the amount of litter in an
2 annual cleanout?

3 A. Somewhere around 300 ton maybe, 350 ton.

4 Q. All right. Do you cake-out now when -- in
5 your operation?

6 A. Yes.

7 Q. How often do you cake-out?

8 A. Usually after every batch. In between every
9 batch.

10 Q. Is a batch the same as a flock?

11 A. Yes.

12 Q. And you, in addition to that, do a cleanout
13 on an annual basis?

14 A. Once a year, yeah.

15 Q. All right. Do you know how much comes out on
16 a cake-out when you perform that task?

17 A. I don't really have any way of guessing that.
18 I'm going to say in a year's time around a hundred
19 ton.

20 Q. Okay. Do you own your own spreader truck?

21 A. No.

22 Q. In the past, have you traded litter with
23 someone in order to borrow or use a truck?

24 A. Yes.

25 Q. And is that one of your neighbors?

1 right?

2 A. Yes. If they have a contract, you know, for
3 you.

4 Q. Now, do you also raise cattle?

5 A. Yes.

6 Q. And how many head of cattle do you typically
7 run?

8 A. Fifty-five, sixty.

9 Q. And what do you feed the cows?

10 A. I raise hay on my property, and if I happen
11 to not have enough hay, I buy range cubes.

12 Q. When did you first start raising cattle?

13 A. Well, I don't know. Back in the early '80s
14 on my own.

15 Q. Before you started raising chickens?

16 A. Yes, yes. I've been around them all my life
17 but --

18 Q. Now, when you became a poultry-grower, was
19 the fact of getting the litter something that was
20 important to you?

21 A. Yes.

22 Q. Do you consider litter to be a valuable
23 asset?

24 A. Yes, I do.

25 MR. GARREN: Objection; leading.

1 THE COURT: Sustained. Rephrase.

2 Q. (BY MS. BRONSON) Why is the litter important
3 to you?

4 A. If I didn't have the litter, I wouldn't be
5 able to afford to fertilize my land and I would
6 probably have to cut my cattle herd two-thirds.

7 Q. Now, who owns your farm?

8 A. I do.

9 Q. Are you your own boss?

10 A. Yes.

11 Q. Is that important to you?

12 A. Yes, ma'am.

13 Q. Is the right that you have to take control of
14 the litter and decide what happens to it important to
15 you?

16 A. Yes.

17 Q. When you sell the litter, who gets that
18 money?

19 A. I do.

20 Q. Who's responsible for the day-to-day
21 technical activities on your farm?

22 A. I am.

23 Q. Who pays the utilities required for growing
24 chickens?

25 A. That would be me.

1 THE COURT: Overruled.

2 Q. (BY MR. JORGENSEN) The question was, based
3 on your experience, has there been a tradition in the
4 poultry industry about who owns the litter?

5 A. It's just always been my understanding that
6 it was the poultry-grower's litter.

7 Q. And who owns, to your understanding, the
8 poultry litter that's produced on your farm today?

9 A. I do.

10 Q. Now, before you can put birds in your house,
11 do you have to put something down for them?

12 A. Yes.

13 Q. What do you put down?

14 A. We put down rice hulls.

15 Q. Okay. Can I refer to that as "bedding"?

16 A. Yes.

17 Q. Who buys the clean bedding, the rice hulls,
18 that go into your houses before the birds come?

19 A. I buy.

20 Q. How much does it cost?

21 A. Approximately twelve- to thirteen-hundred
22 dollars a semiload, and I usually put two semiloads
23 in.

24 Q. Okay. Who pays for that?

25 A. I do.

1 Q. Now, I think I heard you say you sell your
2 litter. Did I understand that right?

3 A. Some of it, yes.

4 Q. Yeah. And who gets the money from that?

5 A. I do.

6 Q. Have you ever used the money you got from the
7 sale of the litter to offset the cost of buying clean
8 bedding for the next flock?

9 A. Yes. That's -- that's the only bonus that I
10 get is the fertilizer and then being able to sell it.

11 Q. Now, is that important to you?

12 A. Yes, sir.

13 Q. Now, I don't represent Simmons, but if
14 Simmons took your litter away from you, would that
15 affect you?

16 A. Very much.

17 Q. How so?

18 MR. RIGGS: Judge, asked and answered,
19 Your Honor, with Ms. Bronson.

20 MR. JORGENSEN: I don't think so.

21 THE COURT: Overruled.

22 Q. (BY MR. JORGENSEN) I'm sorry. Go ahead.
23 The question was, how would it affect you?

24 A. Well, it would affect my cattle herd. I run
25 approximately 55 to 60 head. I would have to cut them

1 down to at least 25 to 30 because I couldn't grow the
2 grass. I couldn't sell the extra litter that I can't
3 use to buy the bedding back.

4 Q. Okay. Now, moving topics, you just said
5 that you -- I believe that you sell some of your
6 litter so I won't ask if you use all of it on your
7 property.

8 So the part that you don't -- the part of
9 your poultry litter that you don't use on your
10 property -- that's what I'm talking about -- where
11 does it go?

12 A. Usually it goes out to a different watershed,
13 Hennessey, Oklahoma, out west; it goes north to Welch,
14 Oklahoma, to some farm ground, row-croppers.

15 Q. Have you ever heard of a company called B & S
16 Contracting?

17 A. Yes.

18 Q. What is that?

19 A. That is a company that cleans out and
20 spreads, transports chicken litter.

21 Q. Do have any relationship with them?

22 A. Yes, I do.

23 Q. What is it?

24 A. I work for them.

25 Q. And how long have you worked for them?

1 A. Approximately a year and a half.

2 Q. So what do you do for B & S?

3 A. I help them clean out chicken houses.

4 Q. Now, in the time you've been familiar with
5 B & S, where has B & S transported? Take your time
6 and tell His Honor your experience.

7 A. Well, we've spread anywhere from around in
8 our area to Porter, Oklahoma; Tulsa; Lamar, Missouri;
9 Chetopa, Kansas; Welch, Oklahoma. Then we take some
10 of it to a -- it's a place called AgNatural, which is
11 a composting facility that composts it.

12 Q. Well, tell me more about AgNatural.

13 A. They compost the litter, they mix it with
14 clay, dirt, hay, wood chips, different things, and
15 make a commercial fertilizer out of it for golf
16 courses, flower gardens, flower beds.

17 Q. Now, I'm not from Oklahoma -- you may have
18 noticed -- but in those areas you've just named, are
19 they all close to your barn? Are they all within five
20 miles of your barn?

21 A. No.

22 Q. Are they close to the barns where you remove
23 the litter? Are they all within five miles of the
24 barn where you remove the litter?

25 A. No. Not all of them.

1 Q. Now, I believe -- I believe Ms. Bronson asked
2 you that when you sell the litter for yourself, who
3 gets the money.

4 So let me skip over that and say, when you're
5 working with B & S Contracting and you're involved in
6 a sale of litter, who gets the money for the litter?

7 A. The farmer does, the poultry-grower.

8 Q. Have you ever seen an instance where the
9 integrator got the money?

10 A. Never.

11 Q. Now, I believe you testified that you use
12 poultry litter as a fertilizer?

13 A. Yes.

14 Q. How does it perform in your experience as a
15 fertilizer?

16 A. Well, it performs really well. I mean, it's
17 a slow-release versus commercial fertilizers you're
18 dependent a lot on the rain pretty quick after you
19 land-apply it, because if it starts to break down, it
20 forms a gas and just -- you lose quite a bit of your
21 fertilizer.

22 Q. All right. His Honor and I both grew up on
23 farms, but for the record, for the Tenth Circuit who
24 might read this, I want you to elucidate on that a
25 little bit.

1 they're using the mineral lick?

2 MR. GARREN: Leading, Your Honor.

3 THE COURT: Sustained. Rephrase.

4 Q. (BY MR. JORGENSEN) The mineral licks that
5 you have bought, do they say anything about access to
6 water?

7 A. Most of them say --

8 MR. GARREN: Objection, Your Honor.
9 Licks aren't going to talk.

10 THE COURT: No, I know what he's talking
11 about. Overruled.

12 Go ahead.

13 A. Most of them had feeding instructions on them
14 that say that you need to place them near -- near
15 abundant water.

16 MR. JORGENSEN: I'm very close to being
17 done, Your Honor.

18 Q. (BY MR. JORGENSEN) Do you remember that
19 Mr. Nance asked you if you have sufficient land to use
20 all of your poultry litter? Do you remember that?

21 A. Yes.

22 Q. In your experience, is there demand for
23 poultry litter in the marketplace?

24 A. Yes, there is.

25 Q. Have you ever had difficulty finding a buyer

1 for your litter who could apply it under their soil
2 test and Animal Waste Management Plan?

3 A. No.

4 Q. Do you know who John Littlefield is?

5 A. Yes, I do.

6 Q. Who is John Littlefield?

7 A. He is my poultry inspector.

8 Q. Okay. What does he do as your poultry
9 inspector?

10 A. He comes from -- I call him when I have a
11 problem, a large death loss maybe, or something, which
12 I haven't had. And he also comes by at least once a
13 year and checks my records, makes sure I'm keeping my
14 records right, writes a report, sends it to ODA.

15 Q. When he comes by your farm once a year, I
16 think I just heard you say, to check your records,
17 does he check whether you have an Animal Waste
18 Management Plan?

19 A. Yes.

20 Q. Does he check whether you followed your
21 Animal Waste Management Plan?

22 A. Yes.

23 Q. Has he ever determined that you either didn't
24 have one or that you weren't following it?

25 A. No.

1 probably two or three flocks and then I bought my
2 parents' farm which they had a house there that --

3 Q. Now, George's did not instruct you to clean
4 out annually; correct?

5 A. No.

6 Q. And they did not instruct you to cake-out
7 between flocks; correct?

8 A. No.

9 Q. Mr. Garren asked you a few questions and they
10 started out when you worked for George's. Have you
11 ever been an employee of George's?

12 A. No, I haven't.

13 MS. TUCKER: That's all. Thank you.

14 THE COURT: Mr. Garren.

15 **REDIRECT EXAMINATION**

16 **BY MR. GARREN:**

17 Q. Mr. Reed, you indicated that without the
18 litter you couldn't grow grass. Is that absolutely
19 true?

20 A. I indicated that I couldn't grow as much
21 grass.

22 Q. All right. Well, my quote here was you just
23 couldn't grow grass. But you can grow grass without
24 the litter, can you not?

25 A. You might can grow some, yeah. Mostly weeds

1 document, the contract that you have with Peterson,
2 says that you're also to provide them any periodic
3 reports that you're required to provide any local,
4 state, or federal agency as might pertain to such
5 plan.

6 Did you, in fact, provide any such periodic
7 reports to Peterson Farms?

8 A. Did I deliver them to them?

9 Q. Or give them to them in any way or --

10 A. I had them in a file. They was available to
11 them if they wanted them. All they had to do was ask
12 for them.

13 Q. Did they ever ask for them?

14 A. No, sir.

15 Q. Did they ever then see them?

16 A. Not my knowledge.

17 Q. Did Peterson require you by contract to
18 dispose of the poultry waste produced by their birds?

19 A. You're meaning the litter; is that correct?

20 Q. Yes, sir.

21 A. Yeah, it belonged to me. I needed to do with
22 it as I could.

23 Q. Can you tell me anywhere in this contract
24 where it says you own the litter as opposed to being
25 instructed to dispose of it?

1 pay someone to do it?

2 A. I pay someone to do it.

3 Q. All right. And do they indicate to you how
4 much is removed when it's removed?

5 A. They do.

6 Q. And you don't remember, sitting here today,
7 how much you generate out of those barns?

8 A. No, sir, I do not.

9 Q. Have you applied all that you generate from
10 your barns on your own land?

11 A. No, sir.

12 Q. Have you applied in the past all that's
13 generated on an annual basis on your lands?

14 A. All of it probably four, five years ago,
15 yes.

16 Q. Okay. You first started in around 2000,
17 2001; correct?

18 A. Yes, sir.

19 Q. How many years did you not use all the waste
20 generated from your barns as to be -- to be applied on
21 your land?

22 A. I don't believe I have used all of it in the
23 last four years.

24 Q. All right. What do you do with it?

25 A. I sell it.

1 Q. To whom do you sell it?

2 A. BPS out of Lincoln -- BMP's.

3 Q. BMP's, Inc.?

4 A. Yes. Out of Lincoln. I sold some to some
5 local farmers.

6 Q. And when you sell it to local farmers, what
7 do they do with it?

8 A. They take it out of the watershed. They
9 apply it in Kansas, Missouri. They got some sod
10 farms. I don't really know what they do with it.

11 Q. Okay.

12 A. Other than it is agreed that they're taking
13 it out of the watershed.

14 Q. So that's what your intention is when you
15 sell it?

16 A. Yes, sir. My intentions are to make money,
17 to be honest. But I want it as a secondary to be
18 taken out of the watershed.

19 Q. Do you apply any other poultry litter on your
20 land that's not generated from your barns?

21 A. No, sir.

22 Q. Do you buy commercial fertilizer to grow
23 grass?

24 A. I have -- I have in the past.

25 Q. And have you done it in the last four years

1 Q. Well, the litter's not free when you're
2 growing it in your barn?

3 A. No, it's not.

4 Q. Oh. How is it not free? Others have
5 testified that it is.

6 A. You got to bring it out of your barn and hire
7 somebody to take it out of your barn and spread it on
8 your field. So it's by far from free.

9 Q. Okay. And so if you don't own those trucks
10 and that equipment, it comes out of pocket; correct?

11 A. Exactly.

12 Q. But you come out of pocket to buy fertilizer
13 too, don't you?

14 A. Exactly.

15 Q. Since you're in the last four years selling
16 it so that you think it's going out of the watershed,
17 I'm going to assume you don't use or need that used
18 litter in growing your birds, do you?

19 A. You said, did I use all of it or sell all of
20 it. I still use part of it.

21 Q. All right.

22 A. The main reason that I'm selling it is to
23 generate income. I could use it all on my farm, but I
24 need the cash flow to pay back for bedding in my
25 chicken houses is the reason that I sell it. It's not

1 a fact that I can't use the fertilizer. It's the fact
2 that I need the cash flow to operate.

3 Q. All right. Let's talk about some of your
4 experience with ODAFF and your requirements under the
5 law to be a poultry operator.

6 Can you tell the court how long was it before
7 you began growing birds for Peterson that you
8 requested a Nutrient Management Plan?

9 A. I'm going to say within a year probably, and
10 I'm working off of memory here, sir.

11 Q. I want you to look at Exhibit 1848 there in
12 front of you. Go to Bates stamp No. 105.

13 A. Okay.

14 Q. Do you see a letter there addressed to you
15 and Beverly Saunders dated May 13th, '02?

16 A. Yes, sir.

17 Q. And is that the letter you received upon
18 having requested your first Animal Waste Management
19 Plan?

20 A. Yes, sir.

21 Q. And you testified earlier that you actually
22 began growing birds in December of 2000 or February of
23 '01; correct?

24 A. February of '01, yes, sir.

25 Q. You registered in December of 2000 with the

1 A. Yes, sir.

2 Q. And what was your motivation for going into
3 the chicken-growing business?

4 A. It was twofold actually. Knowing that the
5 farm was poor, we needed some fertilizer. We couldn't
6 afford commercial fertilizer so we bought it for the
7 chicken litter. Plus, the job would give me a chance
8 to stay home full-time and farm.

9 Q. All right. When you say "the farm was poor,"
10 can you explain what that means?

11 A. The farm has grown up and been neglected for
12 about ten years and have gone back to brush. The soil
13 content on the 500 acres wouldn't run 30 head of cows
14 year-round.

15 Q. Okay. Now, what was a poultry operation
16 going to do for your cattle business?

17 A. Number one, it would be able to get the
18 litter to apply to the farm to make grass. But number
19 two was the cash flow that I could improve the farm
20 with fencing as well as supplying me a job and an
21 income.

22 MR. GARREN: Your Honor, I'm going to
23 object to this line of questions. I don't really
24 think it's relevant to the circumstances of this case
25 and ask that the last response be stricken.

1 THE COURT: Relevance?

2 MR. MCDANIEL: Your Honor, we're trying
3 to -- it's a very important part of the defendants'
4 case the symmetry between poultry and the cattle
5 business, and it goes very much to the issue where the
6 plaintiffs would like the court to accept the notion
7 that poultry litter is a waste byproduct. Having this
8 gentleman explain that it was an asset that actually
9 drove his decision to enter the business, I think, is
10 relevant on that point.

11 THE COURT: All right. Overruled.

12 Go ahead.

13 Q. (BY MR. MCDANIEL) Have you achieved those
14 goals, Mr. Saunders?

15 A. We're still achieving them, but yes.

16 Q. All right.

17 A. Excuse me. I manage to farm full-time now
18 and the farm is -- we're building it up.

19 Q. All right. The individual who owned your
20 poultry farm before you, what was his name?

21 A. Keith Morgan.

22 Q. Now, do you know if Mr. Morgan had that farm
23 registered with ODAFF at the time you purchased it?

24 A. He did.

25 Q. Were you under the impression at the time

1 Q. Now, this cattle operation, on average how
2 many head of cattle are you running these days?

3 A. About 125 head.

4 Q. What kind of operation?

5 MR. GARREN: Objection; relevance.

6 THE COURT: Overruled.

7 A. Purebred and commercial.

8 Q. (BY MR. MCDANIEL) Now, how has your cattle
9 operation changed over the years, particularly since
10 you purchased your poultry operation?

11 A. We've managed to improve the farm and improve
12 the grass quality. We've improved -- or increased the
13 number of head that we're able to carry and moved into
14 a registered operation.

15 Q. How has the poultry part of your business
16 affected the profitability of your cattle operation?

17 A. It's made a difference between running 30
18 head of cows and 125, so it's been tremendous.
19 There's no comparison today.

20 Q. All right. Let's talk about litter
21 management.

22 Mr. Garren asked you about Exhibit 1848.
23 That's the letter from the NRCS to you and your wife
24 dated in May of 2002. Do you remember a few questions
25 on that document?

1 MR. GARREN: Objection, Your Honor.
2 That calls for a legal conclusion.

3 MR. MCDANIEL: I asked for his
4 perspective.

5 THE COURT: Overruled.

6 Q. (BY MR. MCDANIEL) Sir, if you don't have
7 enough poultry litter to cover all of your pastures,
8 how do you manage further productivity of the forage
9 on your cattle operation?

10 A. If I had to, I would have to buy commercial
11 fertilizer.

12 Q. Has Peterson Farms ever played any role in
13 how you manage your cattle operations?

14 A. No, sir.

15 Q. All right. If we're speaking about your
16 overall agricultural operation being your poultry farm
17 and your cattle operation, do you make use of the
18 poultry litter in your agricultural operation when you
19 take it out of your poultry house?

20 A. Yes.

21 Q. Is poultry litter -- excuse me. How do you
22 use it?

23 A. I either apply it or sell it.

24 Q. Okay. And it's valuable to your operation, I
25 assume?

1 A. It's an asset to the farm, yes, sir.

2 Q. Have you ever land-applied poultry litter
3 simply because you needed to get rid of it?

4 A. No, no.

5 Q. In your experience, have you ever observed
6 anyone land-applying poultry litter simply because
7 they needed to get rid of it?

8 A. No, sir.

9 Q. Does that make any sense in your mind?

10 A. It makes no sense at all.

11 Q. Why?

12 A. Well, it's got a value. Today it's \$15 a
13 ton. So why would you just dump it when you can pick
14 up a phone and sell it for \$15 a ton and never touch
15 it? It makes no sense just -- I mean, the same thing
16 as throwing money out the window.

17 THE COURT: \$15 a ton in the barn?

18 THE WITNESS: In the barn, yes, sir.

19 Q. (BY MR. MCDANIEL) Sir, if you lost your
20 poultry litter, what would be the effect on your
21 overall operation?

22 A. It would be devastating. I mean, to the
23 point that at 500 tons, the number that you used, if I
24 sell even two-thirds of it at \$15 a ton, and then when
25 I clean out and I have to put bedding back in at

1 approximately \$1500 to \$2,000 a semiload for four
2 semiloads, I mean, that's just a dead loss. I've got
3 no way to recoup it.

4 The expenses have got so high that you need
5 to sell or make money on about anything that you've
6 got there. So it would make a difference between the
7 farm cash-flowing and not is where it would make a
8 difference.

9 Q. The between survival and not survival?

10 A. Exactly.

11 Q. When you said \$1500 a semiload per bedding,
12 did I hear you correctly?

13 A. Between 1500 and 2,000, yes, sir.

14 Q. And you said four semis?

15 A. Yes, sir.

16 Q. And that will take care of all five of your
17 houses?

18 A. Yes, sir.

19 Q. All right. So \$6,000 a year for bedding; is
20 that the extent --

21 A. Exactly.

22 Q. Okay. Now, does the State of Oklahoma send
23 an inspector to your farm every year?

24 A. Yes, sir.

25 Q. Who is your -- who's currently your

1 Your Honor.

2 THE COURT: Any further questions?

3 MR. GEORGE: No, Your Honor.

4 **CROSS-EXAMINATION**

5 **BY MR. ELROD:**

6 Q. I just want to get a couple numbers in the
7 record that aren't here yet out, Al, having to do with
8 your stocking rate.

9 Your testimony was that -- we've met before,
10 have we not? I'm John Elrod, represent Simmons.

11 You testified that in the bad old days your
12 stocking rate was 30 cattle and that's increased to
13 125. Is that your testimony?

14 A. Yes, sir.

15 Q. You're talking about mother cows?

16 A. Yes, sir.

17 Q. And your intention is that they calf every
18 year; correct?

19 A. Yes, sir.

20 Q. So there's a 95 mother cow difference between
21 the old days and the present day; is that true, sir.

22 A. That's correct.

23 Q. And would you tell His Honor, year in and
24 year out approximately how much money a 210-day weaned
25 calf will bring at the sale barn?

1 MR. GARREN: Objection; relevance.

2 MR. ELROD: Your Honor, this is an
3 equitable case. It has to do with injunctive relief
4 that's being sought by the state.

5 MR. GARREN: Actually, it doesn't have
6 to do with other parties, Your Honor. The state's
7 bringing an action --

8 MR. ELROD: Well, this is the man that's
9 going to be impacted by what the state's asking be
10 done.

11 THE COURT: I think equity takes into
12 consideration everybody that may be affected.
13 Overruled.

14 MR. ELROD: Thank you, Your Honor.

15 Q. (BY MR. ELROD) Would you tell His Honor the
16 approximate price that a 210-day-old weaned calf will
17 bring year in and year out?

18 A. Probably \$500.

19 Q. About \$500?

20 A. Yes, sir.

21 Q. So if there was a 95-calf difference between
22 the old days and what you can do now, that would be
23 somewhere in the range of \$42,500 income that you
24 don't -- would not be receiving; is that fair, sir?

25 A. Exactly.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME XLI - AM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 12, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 THE WITNESS: We do have --

2 THE COURT: So you have responsibility,
3 at least with respect to the movement of litter, from
4 your own growing facilities; correct?

5 THE WITNESS: If they were in one of
6 those business units identified. We have more than
7 those -- we have more than three business units at
8 Tyson Foods, and the contract -- the company-owned
9 farms I would have to go through. We do not have that
10 many company-owned farms.

11 THE COURT: I understand. But with
12 respect to those company-owned farms, your job does
13 encompass whatever environmental responsibilities that
14 come with those farms; correct?

15 THE WITNESS: That would be correct.

16 THE COURT: All right. And I take it
17 you facilitate the movement of litter outside the
18 watershed through BMP; correct? Or what's the name of
19 the --

20 THE WITNESS: BMP, Inc.

21 THE COURT: It's not BMP. What's the --
22 so many acronyms here -- what's the name of the
23 company that you all have utilized there?

24 THE WITNESS: It is BMP, Inc.

25 THE COURT: Okay.

1 Q. Is it true also that Cargill, and now the
2 L.L.C., place its company signs at each of its
3 contract grower's farms?

4 A. Yes.

5 Q. Do your growers compete for ranking within
6 the complex based on a flock at the time?

7 A. They compete within a settlement period,
8 yes.

9 Q. Okay. And that's in part of some
10 consideration of how they're paid; is that correct?

11 A. Yes.

12 Q. Do you agree that there is no express
13 language in any of the Cargill or CTP contracts
14 conveying or transferring ownership of the poultry
15 manure excreted by the birds to the growers?

16 A. While that's not expressly written into the
17 contract, the contract discusses nutrient management
18 and growers have the understanding that they own the
19 litter.

20 Q. So the answer to my question is, that's
21 correct, it's not expressly written?

22 A. I think it's not expressly written but
23 implied.

24 Q. You agree, sir, that once the poultry waste
25 is removed from the grow-out barns, it's no longer

1 A. No. The growers are independent contractors
2 and the Nutrient Management Plan is site-specific to
3 their operation, part of their business plan.

4 Q. You would agree with me that Cargill was
5 growing birds in the IRW before 1998, though; correct?
6 That was before the laws in the state of Oklahoma went
7 into effect?

8 A. I wasn't at Cargill, but I understand that
9 they were.

10 Q. Okay. Now let's talk about Arkansas, the
11 laws in Arkansas.

12 With regard to Nutrient Management Plans, can
13 you tell me when it was required in Arkansas by law to
14 have one actually in place or to have asked for one to
15 be created?

16 A. I believe that date is 2007.

17 Q. Okay. Now, prior to 2007 on the Arkansas
18 side -- let's break it down this way.

19 Do you know on a percentage basis how many
20 growers Cargill has on the Arkansas side of the IRW as
21 opposed to the Oklahoma side?

22 A. Roughly I know the number.

23 Q. On a percentage basis, do you know what that
24 percentage is?

25 A. Not without a calculator.

1 litter is transferred to a third party.

2 Q. Whose litter is it?

3 A. It's mine.

4 Q. In your 30 years in the poultry industry in various
5 locations in the country, have you ever encountered a
6 situation where the growers don't have -- don't believe
7 the litter is theirs?

8 MR. GARREN: Objection, foundation, calls for
9 hearsay then.

10 THE COURT: Overruled.

11 THE WITNESS: No.

12 Q. (By Mr. Ehrich) As vice president of agricultural
13 operations for Cargill, do you sign the contracts with
14 Cargill's contract producers?

15 A. Yes.

16 Q. In that capacity, you're familiar with those
17 contract terms, aren't you?

18 A. Yes.

19 Q. Have you ever had a situation where someone who
20 wants to grow turkeys for Cargill has said, I'll take
21 this deal, but I don't want the litter? Ever had that
22 situation?

23 A. Not, not to my knowledge.

24 Q. Ever had the situation where someone wants to grow
25 turkeys for Cargill has said, it's a great deal, but, you

Terri Beeler, RMR, FCRR

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1 A. The litter belongs to our growers, and they know how
2 much litter they produce just based on either an estimate
3 on how many trucks they actually pull out of the house.
4 The best way to actually know is when you load it onto a
5 truck and you take it to scales. So if the grower sends
6 it out to be land applied or utilized at a mushroom plant
7 or whatever where they've actually got scales, then we
8 have a really good idea. But other than that, it's just
9 speculation.

10 Q. The company never inquired about any of that?

11 A. No, we did not.

12 Q. Was it of significance to Peterson that it was
13 operating in a watershed which had been designated a
14 scenic river?

15 A. Yes.

16 Q. Did the fact that the Illinois River had been
17 designated a scenic river make any difference in the way
18 Peterson operated in that watershed?

19 A. We still require our growers to have a Nutrient
20 Management Plan and to use those plans properly in
21 utilizing their nutrients. So I would say that it didn't
22 make a difference being a scenic river, because we still
23 expected them to follow the law and their Nutrient
24 Management Plans.

25 Q. Was distance from a feed mill a factor for Peterson

1 Q. Was the amount of available land on which to land
2 apply their litter ever a factor in selecting a
3 particular grower?

4 A. Would you restate that.

5 Q. Was the amount of land available to the potential
6 grower on which to land apply poultry litter ever a
7 factor used by the company in selecting growers?

8 A. I understand you better now. No, it wasn't, because
9 a lot of the farms might have had other properties to
10 apply to or they had neighbors that bought their litter
11 or they shipped it out of the area, trucked it away. So
12 we didn't use that for grounds to approve or disapprove.

13 THE COURT: Mr. Riggs, I found my notes with
14 regard to Henderson. He said that they tried to keep the
15 growers within 20 miles. So the objection is overruled.
16 Go ahead. Do you recall the question?

17 THE WITNESS: No, I don't.

18 THE COURT: Go ahead, Mr. Riggs.

19 THE WITNESS: You said something about was I
20 surprised --

21 Q. (By Mr. Riggs) To learn -- I think you said you
22 wouldn't be surprised to learn it was within 20 miles of
23 the feed mill?

24 A. I had heard before that it was roughly at one time a
25 pretty small area, pretty small confinement, but that

1 would basically be in the Eucha-Spavinaw Watershed from
2 the Decatur area, that small of an area really puts it
3 close --

4 Q. What I -- are you trying to correct the testimony of
5 Mr. Henderson?

6 A. No, I was just making a comment.

7 Q. Did Peterson ever track what was done with the waste
8 being generated by its chickens?

9 A. No, it didn't.

10 Q. Did Peterson know what most of its growers did with
11 their waste or their litter?

12 A. No. It was the growers' litter or nutrients to use,
13 so we just expected them to follow their Waste Management
14 Plans.

15 Q. When did it first become the growers' litter, as far
16 as Peterson was concerned?

17 A. It always has been.

18 Q. When was it first put in the contract?

19 A. Probably back in '97, '98. I'm not sure, but it was
20 in the '90s.

21 Q. Why did it become necessary to put it in the
22 contract if it had always been their litter?

23 A. I believe that the reason it was put in the contract
24 so that it wouldn't be a question on whose -- had the
25 rights or, you know, who had the assets of the litter.

1 Q. (By Mr. Riggs) Did Mr. Mullikin ever bring to the
2 company's attention a problem or concern about growers
3 not having an adequate place to properly and safely land
4 apply their litter?

5 A. I don't know the exact verbiage of the memo, but I
6 believe that is correct.

7 Q. Did the company ever do anything in response to
8 having that brought to their attention?

9 A. Not that I'm aware of, no.

10 Q. Do you know why -- first, let me ask, what is BMPs,
11 Inc.?

12 A. I believe it's a clearinghouse to help match buyers
13 and sellers of poultry litter.

14 Q. Was Peterson involved in that effort?

15 A. I believe we did have people involved in that
16 effort.

17 Q. Weren't at least five integrators involved in
18 helping to establish BMPs, Inc.?

19 A. I believe so.

20 Q. Why do you think BMPs, Inc. was established?

21 A. I believe it was established to -- for any contract
22 grower that needed to find a place to take poultry litter
23 to. There was different reasons. I mean, some growers
24 needed the money more than they needed to probably use
25 the fertilizer. Some growers don't use cattle, don't

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1 have cattle, don't make hay on their place, so they would
2 just as soon sell it.

3 So it helped tie buyers and sellers together so
4 that the grower didn't have to try to hook up with
5 someone in western Oklahoma or southeast Arkansas and so
6 forth and so on. Vice versa: The buyers didn't have to
7 try to find the grower. So it worked out for that
8 reason.

9 Q. So you're not suggesting that there was no
10 environmental reason for that, are you?

11 A. No, I'm not saying there was. I'm saying that was
12 the main reason for the BMPs was to help find buyers and
13 sellers and put them together.

14 Q. Wasn't water quality and a concern for water quality
15 one of the reasons BMPs, Inc. was established?

16 A. It probably was. If a grower's management plan
17 didn't allow him to land apply anymore litter, then he
18 would probably need to take his to another location.

19 Q. BMPs would help do that, right?

20 A. There again, they were the clearinghouse to help
21 match them up together, yes.

22 Q. From your 27, I think you said, years of experience
23 with the company --

24 A. Twenty-one.

25 Q. Twenty-one. Can you tell us if any -- at any time

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
capacity as ATTORNEY GENERAL)	
OF THE STATE OF OKLAHOMA,)	
et al.)	
)	
Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

VOLUME XLIII - AM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 16, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 group of growers?

2 A. Yes, sir.

3 Q. Does he usually get a bonus?

4 A. Yes, sir.

5 Q. Would it be fair to say he obviously has
6 healthy birds?

7 MR. GARREN: Objection, Your Honor. I
8 think we're off now down a rabbit trail, not relevant.

9 THE COURT: I see the relevance.
10 Overruled.

11 A. Yes, sir. He normally has healthy birds.

12 Q. (BY MR. TUCKER) So for his operation, it's
13 different than the Cargill recommendation; is that
14 correct?

15 A. Yes, sir.

16 Q. How long has Mr. Schwabe grown for Cargill?

17 A. I believe since around 1977.

18 Q. Has Cargill disciplined Mr. Schwabe for not
19 following the cleanout guideline?

20 A. No, sir.

21 Q. If a grower sells his litter, does Cargill
22 receive any of the proceeds?

23 A. No, sir.

24 Q. In the ordinary course of Cargill or CTP's
25 business, do CTP or Cargill ever track what the

1 Q. You told Mr. Garren that you had gone back
2 and you had reviewed the Nutrient Management Plans and
3 the farm registration records; is that correct?

4 A. Yes, sir.

5 Q. Mr. Garren indicated that 2,000 tons a year
6 were produced and that there were only 200 and some
7 acres eligible to receive litter in his questions.

8 Did he ask you whether 2,000 tons of litter
9 was applied on the breeder farms?

10 A. No, sir, he didn't.

11 Q. As a result of your review of the
12 registrations, was there anything like 2,000 tons of
13 litter applied to the breeder farms?

14 A. No, sir.

15 Q. Now, you said that litter was applied to
16 farms 3, 4, 5, and 6 because those were eligible to
17 receive litter; is that correct?

18 A. Yes, sir.

19 Q. For farms 3, 4, 5, and 6, did -- for all
20 those years put together, did those farms altogether
21 receive 2,000 pounds?

22 A. No, sir.

23 Q. And when was litter last applied to those
24 farms, 3, 4, 5, and 6?

25 A. I believe in '04.

1 farms 3, 4, 5, and 6?

2 A. Yes, sir.

3 Q. Okay. And farm 2, we already talked about
4 the registrations don't reflect that any litter was
5 applied; is that correct?

6 A. Yes, sir.

7 Q. I'm going to ask you to look at Exhibit
8 6184-A, Oklahoma Exhibit 6184-A.

9 MR. TUCKER: May I give one of these to
10 the witness, Your Honor?

11 THE COURT: Yes, sir.

12 Q. (BY MR. TUCKER) Can you tell me what that
13 is, please?

14 A. These would be the farm audits that the flock
15 supervisors do two times a year.

16 Q. Now, this is a State of Oklahoma exhibit as
17 opposed to a Cargill exhibit.

18 Does this represent all the environmental
19 audits that were conducted or not?

20 A. No, sir, it's not all of them.

21 Q. Would this just appear to be a selection of
22 those -- of those audits?

23 A. Yes, sir.

24 Q. And this is the form that is used; is that
25 correct?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
Plaintiffs,)
vs.) CASE NO. 05-CV-329-GKF-PJC
TYSON FOODS, INC., et al.,)
Defendants.)

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
NOVEMBER 16, 2009
BEFORE THE HONORABLE GREGORY K. FRIZZELL, DISTRICT JUDGE
VOLUME XLIV, P.M. SESSION

APPEARANCES:

For the Plaintiffs: MR. W.A. DREW EDMONDSON
Attorney General
MS. KELLY FOSTER
Assistant Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105

1 A. The average was 402.

2 Q. And what percentage of those samples had an STP
3 value in excess of 65?

4 A. Ninety percent.

5 MR. MCDANIEL: Objection. Relevance. I don't
6 think it's appropriate, Your Honor, to compare Arkansas
7 soil tests to OSU's methodology.

8 THE COURT: That's subject to
9 cross-examination. Overruled. Go ahead.

10 THE WITNESS: Ninety percent.

11 Q. (By Mr. Nance) And what percentage had an STP value
12 over 40, please?

13 A. Ninety-six percent.

14 Q. Dr. Johnson, did you do a similar analysis of the
15 four Oklahoma counties you mentioned earlier?

16 A. Yes.

17 Q. And what was your source of information for --
18 source of data for those four counties?

19 A. That was the soil test archive data from the OSU lab
20 for those three years for those four counties.

21 Q. Once again, is that the kind of data that soil
22 scientists reasonably rely upon in their work?

23 A. Yes.

24 Q. As regards -- for the same time period, as regards
25 for the four Oklahoma counties, what was the overall

1 average STP?

2 A. The average STP was 102.

3 Q. Now let me ask you what the percentage of those
4 values over 65 was.

5 A. It was 41 percent.

6 Q. And is that a lower number than appeared in your
7 report?

8 A. Yes.

9 Q. Are you correcting a miscalculation in your report
10 now?

11 A. Yes.

12 Q. Okay. What was the percentage of those samples that
13 was in excess of STP 40?

14 A. Fifty-five.

15 Q. Let's go back for a moment, Dr. Johnson, and think
16 about the Arkansas statewide -- or the Arkansas public
17 laboratory data and how it may have changed -- the
18 readings may have changed somewhat over time.

19 I think the Court has heard testimony that there
20 were some new regulations that came into effect in 2006.
21 Were you aware of that?

22 A. Yes.

23 Q. Let's talk about Benton and Washington County before
24 the period of 2006, then we'll talk about it afterwards,
25 all right?

1 A. Yes, yes.

2 Q. Do you consider that it's a common practice that
3 cattlemen and hay farmers purchase and land apply poultry
4 litter?

5 A. Yes.

6 Q. You said you don't think poultry litter is a very
7 good fertilizer?

8 A. That's true.

9 Q. Do these people not know what they're doing?

10 A. I don't know.

11 Q. Are they making a bad purchasing decision for the
12 agronomics of their pastures?

13 A. I don't know what they're paying for the poultry
14 litter.

15 Q. You don't have any idea what the price of litter
16 today is, sir?

17 A. No.

18 Q. Do you know what the price of commercial fertilizer
19 is?

20 A. Not today, I don't. I know that it's quite high.

21 Q. It's been high for the last few years --

22 A. Yes.

23 Q. -- hasn't it?

24 A. Yes.

25 Q. Let's look at Demonstrative 204, please. It will

Terri Beeler, RMR, FCRR

United States Court Reporter
333 W. 4th St.

Tulsa, OK 74103 * 918-699-4877

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
3

4 STATE OF OKLAHOMA, ex rel.)
5 W.A. DREW EDMONDSON, in his)
6 capacity as ATTORNEY GENERAL)
7 OF THE STATE OF OKLAHOMA,)
8 et al.)
9)
10 Plaintiffs,)
11 vs.) CASE NO. 05-329-GKF-PJC
12)
13 TYSON FOODS, INC., et al.,)
14)
15)
16 Defendants.)

17 TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
18 DECEMBER 2, 2009
19 BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE
20 VOLUME 59, A.M. SESSION
21

22 APPEARANCES:

23
24 For the Plaintiffs: MR. W.A. DREW EDMONDSON
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 313 N.E. 21st St.
 Oklahoma City, OK 73105

1 can change.

2 Q. Did you see anything in any of those grower
3 contracts which gave the grower the right to a
4 certain number of birds over a certain period of
5 time?

6 A. Only for the first flock.

7 Q. Do the contracts you reviewed address ownership
8 of the waste generated by the birds?

9 A. Only one.

10 Q. And what was that?

11 A. Defendant Peterson's 2004 contract said that
12 the litter is the exclusive property of the grower.

13 Q. Prior to that provision in that Peterson
14 contract, did you see that provision anywhere else?

15 A. No.

16 Q. Have you seen that provision in any other of
17 the defendant companies' contracts?

18 A. No.

19 Q. Do the contracts make any reference to how the
20 waste is to be managed, the waste that's generated
21 by the integrator's birds while they're being cared
22 for by the grower?

23 A. The contracts, going back in time, generally
24 state that the dead birds are the responsibility of
25 the contract grower. With regard to waste, the

1 right?

2 A. As far as I know.

3 Q. As far as you know, growers have always decided
4 what to do with their litter; isn't that right?

5 A. That they've decided what to do with "the"
6 litter.

7 Q. I'm not going to quibble with you about
8 semantics. The growers decide whether to sell it or
9 whether to land apply it or whether to give it away,
10 right?

11 A. Right.

12 Q. Did you notice in that OSU budget that we were
13 looking at before that the value of the litter was
14 one of the three components of revenue to a poultry
15 grower?

16 A. Yes.

17 Q. So the litter, you would agree with me, at
18 least has cash value to these growers, correct?

19 A. It may.

20 Q. Well, this is not theoretical, sir. It does
21 have cash value. If you can call somebody to come
22 pick up your litter, and they will pay you \$15 a
23 ton, that is real-world cash value; is it not,
24 Dr. Taylor?

25 A. That is a gross value.

1 Q. I'm asking about cash value, sir. Is it cash
2 value?

3 A. Okay.

4 Q. Is it?

5 A. Yes.

6 Q. You talked about take-it-or-leave-it
7 contracts. Do you remember that?

8 A. Right.

9 Q. One of your views is the economic power here is
10 either exercised or manifested in the fact that, as
11 you testified, integrators are not able to --
12 growers are not able to individually negotiate
13 contracts with integrators? Is that your view?

14 A. There is no negotiation that takes place,
15 individually or collectively.

16 Q. Right. And you understand, sir, from your long
17 and intense study of this industry, that the
18 integrators, rightly or wrongly, take the position
19 that they offer identical contracts to similarly
20 situated growers because they are required to as a
21 matter of law. You understand that, don't you?

22 A. I understand that is the integrators' position.

23 Q. And you understand that they take that
24 position, but you believe that their position that
25 they're legally obligated to offer their growers the

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
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TYSON FOODS, INC., et al.,)	
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Defendants.)	

VOLUME 60 - PM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
DECEMBER 2, 2009
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 increase in price or cost?

2 A. I'm not as confident about natural gas price
3 increasing as I am about phosphorus increasing.

4 Q. Well, not only does it require high-priced
5 commercial fertilizer in order for chicken litter to
6 be able to get transported at a profit over long
7 miles, but there's another factor, isn't there, sir,
8 and that is a good phosphorus index in these
9 nutrient-rich watersheds enforced through Nutrient
10 Management Plans that require that chicken litter be
11 squeezed out of these watersheds? That's another
12 factor, isn't it?

13 A. Another --

14 Q. That will help the Roger Collinses of the
15 world be profitable in these transportation hauling
16 enterprises?

17 A. Yes.

18 Q. And that's exactly what's going on in the
19 Illinois River Basin in Oklahoma, isn't it, sir?

20 A. I have not seen hard numbers but I would not
21 be surprised.

22 Q. And you're aware, sir, that the -- are you
23 familiar with Eucha-Spavinaw?

24 A. Yes.

25 Q. And you know that 60 to 70 percent of the

1 go to tunnel houses?

2 A. That's my understanding.

3 Q. All right, sir.

4 MR. ELROD: That's all I have. Thank
5 you.

6 THE COURT: Any further cross?

7 MR. HIXON: Just a few.

8 THE COURT: Mr. Hixon.

9 **CROSS-EXAMINATION**

10 **BY MR. HIXON:**

11 Q. Dr. Taylor, I'm Philip Hixon and I represent
12 Peterson Farms in this matter. It's good to see you
13 again.

14 A few questions on your transportation
15 opinions in this case. It was my understanding that
16 you testified earlier that it was your opinion that it
17 was feasible to transfer 350,000 tons of poultry
18 litter from the Illinois River Watershed to eastern
19 Arkansas; is that correct?

20 A. With fertilizer prices prevailing in '08, it
21 was profitable to do that.

22 Q. Okay. So it was profitable in '08?

23 A. And for '07, it was profitable to haul it
24 almost that far.

25 Q. Okay. Isn't it true that that opinion is

1 based on the cost numbers from this Carreira report
2 that you referenced earlier?

3 A. I started with those but then made quite a
4 few adjustments. One was the fertilizer prices, one
5 was the hauling cost. I used a transportation cost
6 index published by the Bureau of Labor Statistics to
7 try to adjust their cost for higher hauling cost in
8 '09 and -- I mean, in '08 and '07.

9 Q. Okay. The numbers that you used then for
10 your transportation opinions, though, were derived
11 from table 2 in your report; is that correct?

12 A. Let me make sure.

13 Q. I believe that's on page 36 of your report.

14 A. That was the starting point. But since these
15 pertain to one year, I adjusted them for other years
16 based on transportation cost index.

17 Q. Okay. Where is that adjustment in your
18 report?

19 A. It's referenced in the report and it's in the
20 Excel file that I provided and then one of the
21 appendices I think I show it. Appendix -- it's the
22 last appendix, table 5, which is near the end of the
23 report.

24 Q. Table 5 is an adjustment to the Carreira
25 numbers; is that correct? Is that what I am to

1 understand?

2 A. Yes.

3 Q. And it's my understanding that you don't know
4 what went into these Carreira numbers; is that
5 correct? You simply used the numbers that were in the
6 Carreira report?

7 A. And the explanation that was in their journal
8 article.

9 Q. Do you still have your deposition, your July
10 deposition, there in front of you?

11 A. Yes.

12 Q. If you can turn to page 160, line 23.

13 A. 160 --

14 Q. Page 160, line 23.

15 A. Okay. Okay.

16 Q. Okay. The question there: "Okay. And I
17 guess my question, what I was trying to get at, I'm
18 wanting to understand what these numbers represent
19 apart from the description contained in the table
20 itself. And it's my understanding that you don't know
21 what's contained within these numbers apart from what
22 was contained in the Carreira report?"

23 A. Correct.

24 Q. Your answer is, "That's correct"?

25 A. Yes.

1 Q. So is your testimony different today than
2 what it was at your July deposition?

3 A. No, no.

4 Q. Okay. The Carreira report also assumes that
5 the litter that's hauled to eastern Arkansas is baled;
6 is that correct?

7 A. They looked at two alternatives. One was
8 baling and one was unbaled with no back-haul. I only
9 used the unbaled with no back-haul cost because
10 the -- they state that the baling technology is not
11 completely refined and ready to be used.

12 Q. Okay. The Carreira report also assumes that
13 there's a centralized point of distribution; is that
14 correct?

15 A. Correct.

16 Q. Okay. And that's -- that would be located in
17 Prairie Grove or Siloam Springs, Arkansas?

18 A. That would be logical places, yes.

19 Q. That facility does not exist, does it?

20 A. It does not.

21 Q. It's true that you didn't do anything to
22 determine the viability of a demand in eastern
23 Arkansas for 350,000 tons of litter; is that correct?

24 A. I did not do a classical economic-demand
25 study. I did look at the nutrient requirements in the

1 extension budgets for rice and other crops grown in
2 the Arkansas delta.

3 Q. You didn't look to see if there were enough
4 people in eastern Arkansas to purchase 350,000 tons of
5 litter?

6 A. I looked to see if there was enough acreage
7 and enough requirement per acre.

8 MR. HIXON: I move to strike as
9 nonresponsive.

10 THE COURT: Sustained. The question
11 was, "You didn't look to see if there were enough
12 people in eastern Arkansas to purchase 350,000 tons of
13 litter?"

14 A. To me the issue is not number of people, so I
15 didn't look at the number of people, no.

16 Q. (BY MR. HIXON) Earlier you discussed a full
17 economic analysis with Mr. Hopson.

18 In your depositions, we had discussed the
19 concept of a proper economic accounting. Is that the
20 same thing as a full economic analysis?

21 A. Yes.

22 Q. Okay. And it's my understanding that your
23 transportation opinion is not either a full economic
24 analysis or a proper economic accounting; is that
25 correct?

1 IN THE UNITED STATES DISTRICT COURT
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17 TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
18 DECEMBER 17, 2009
19 BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE
20 VOLUME 77, P.M. SESSION

21 APPEARANCES:

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1 largely being driven by the point sources. The
2 nonpoint source phosphorus, to a great extent, is
3 entering the bottom waters of the lake, and a large
4 part of that is being stored in the sediment.

5 And so the opportunity for the nonpoint
6 sources to impact the lake is actually through the
7 recycle process. So if you can think about it, most
8 of the time we're seeing base flow, we're seeing
9 point source-dominated system, we're growing algae.
10 We get runoff events. We bring in a lot more
11 phosphorus. That phosphorus comes quickly through
12 the system, enters the bottom waters, settles into
13 the sediment, then has the opportunity to cause a
14 problem if it recycles back.

15 In this system, it seems that the recycle
16 is actually fairly low, and that that recycle does
17 not contribute significantly to the algal growth the
18 next year. As a result, the high chlorophyll levels
19 that we see are being driven, to a great extent, by
20 the point sources that are coming into the system
21 rather than the nonpoint sources.

22 Q. Building on that explanation and analysis that
23 you just articulated, and in light of all of your
24 investigation and analytical work in this case, have
25 you formed an opinion, Doctor, as to the impact that

1 phosphorus from land-applied poultry litter has on
2 water quality in the watershed?

3 A. Yes. I've concluded that, for the most part,
4 this is a point source-dominated problem. Nonpoint
5 sources are not -- nonpoint sources are not
6 controlling water quality to a great extent in this
7 system.

8 Poultry litter application provides some
9 fraction of those nonpoint sources. As we discussed
10 earlier, poultry litter is one of many potential
11 nonpoint sources into the system. And to the extent
12 that nonpoint sources as a whole are not what's
13 really driving the water quality here, certainly
14 then poultry litter application, which represents
15 only some fraction of nonpoint sources, cannot be
16 controlling water quality in the system.

17 Q. So what would be your opinion, Doctor, if
18 eliminating the use of poultry litter, what would
19 that accomplish on improving water quality?

20 MR. PAGE: Objection, new opinion,
21 Your Honor.

22 MR. GREEN: Your Honor, I don't believe
23 it's a new opinion at all.

24 THE COURT: If you could point me to the
25 portion in the report.

1 MR. GREEN: If you go to the summary of
2 findings, Your Honor, at 1.2, and also look at the
3 summary of detailed findings on 2.1, this opinion
4 that I'm asking for is embraced within those
5 findings. And particularly within summary of
6 finding number 1 and certainly I think the follow on
7 findings on 2 and 3.

8 And also if you turn over to 2.1, I think
9 it's implicit in the further summary of detailed
10 findings in those various bullet points.

11 And I think that because this is both my
12 direct examination of this witness and also, for
13 practical purposes, my rebuttal of the plaintiff's
14 expert case as presented in this courtroom, and
15 because there was considerable discussion among the
16 plaintiff's experts about the impact, if any, of
17 eliminating land application of poultry litter, that
18 there's clearly a predicate, and it is permissible
19 for me to ask this question and elicit this opinion.

20 THE COURT: I think this opinion is
21 encompassed both in item 1 in the summary of
22 findings and 1.2 as well as bullet point 5 in the
23 summary of detailed findings, 2.1. The objection is
24 overruled.

25 Q. (By Mr. Green) So, Doctor, where I was taking

1 you was to ask you what your opinion would be if the
2 use of poultry litter in the watershed were
3 eliminated, what impact would that have, sir, on
4 water quality in the Illinois River Watershed?

5 A. Given the way that phosphorus is operating in
6 the system and the sources of phosphorus that are
7 driving water quality, eliminating poultry litter
8 application would not have a significant impact on
9 the water quality in the lake or in the Illinois
10 River.

11 Q. Doctor, I want to turn now to seek your views
12 on some of the analysis that was performed and
13 testified to in this case by certain of plaintiff's
14 consulting testifying experts.

15 I want to talk about what's come to be
16 sometimes called the ratio analysis, Dr. Fisher's
17 ratio analysis and Dr. Olsen's gradient analysis.
18 You've seen those terms --

19 A. Yes.

20 Q. -- used in your review of your materials?

21 A. Yes.

22 Q. And have you had occasion to review not only
23 their reports but the testimony that they gave with
24 respect to this ratio analysis and this gradient
25 analysis?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
W.A. DREW EDMONDSON, in his)	
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Plaintiffs,)	
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TYSON FOODS, INC., et al.,)	
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Defendants.)	

VOLUME 87 - PM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
JANUARY 6, 2010
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 and the average, the simple average, would be
2 precisely the same.

3 Q. Be a bell curve?

4 A. Yes. And they're not here in large part
5 because of the skewness to the right dragging the
6 simple average upward.

7 Q. Did you prepare a similar analysis for data
8 relating to the four counties in Oklahoma?

9 A. Yes, I did.

10 Q. Okay. Is that set forth in Tyson Defendants
11 Demonstrative 352?

12 A. It is.

13 Q. And is it exactly the same thing with
14 different data set?

15 A. The same computations, yes.

16 Q. Okay. Now, what year's data is this based
17 on?

18 A. This particular chart is based on my report
19 with Dr. Dicks and it's for the year 2007.

20 Q. And to be clear, when Dr. Johnson testified
21 in the courtroom and presented his data, he didn't use
22 '07 data, did he?

23 A. No. My recollection is he used 2004 through
24 2007.

25 Q. Okay. What did he calculate as the mean

1 using '04, '05, '06, and '07 data?

2 A. It was below the mean that I've reported here
3 for 2007. For 2007, it's 107. My recollection for
4 the full data set that he used, it was around 102 or
5 so.

6 Q. Why did you prepare a demonstrative with only
7 '07 data rather than '04 through '07 data?

8 A. Because I was informed by counsel that I had
9 to use what was included in my report with Dr. Dicks.

10 Q. Okay.

11 A. And I did not include an analysis of 2004
12 through 2007, only 2007.

13 Q. All right. Well, let's walk through this
14 quickly then.

15 Did you apply the same type of outlier
16 analysis for this Oklahoma data?

17 A. Yes, I did.

18 Q. And did you engage in the same type of
19 calculation of mode, median, and mean?

20 A. Yes, I did.

21 Q. And, again, which of these numbers, in your
22 opinion, represents a best or better representation of
23 the central tendency of this data?

24 A. Once again, given the skewness of the
25 underlying probability distribution for the sample --

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VOLUME 90 - AM
TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
JANUARY 11, 2010
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 right back into the necessity for using chicken litter
2 today to obtain phosphorus in the watershed?

3 A. That's correct.

4 Q. Now, in reality, Dr. Dicks, are some fields
5 much greater than 45.5?

6 A. Absolutely. We've seen from the data that's
7 from the defendants -- sorry -- from the plaintiffs
8 from Gordon Johnson that that data indicates there's
9 fields out there that have a higher STP than 45.5.

10 Q. All right. But for your purpose, you're
11 spreading it across the entire watershed; correct?

12 A. That's correct.

13 Q. Why is that legitimate?

14 A. Well, there's also fields -- obviously, if
15 given what I've told you about the amount of inflow of
16 nutrients and the amount of outflow of nutrients, if
17 there's fields that are greater -- that we know that
18 have an STP greater of 45.5, there's obviously fields
19 there that are less than 45.5.

20 I think even Dr. Johnson pointed in his
21 data -- I think his estimate for Oklahoma was that the
22 average STP was 55.

23 Q. In the IRW?

24 A. In the IRW.

25 Q. All right.

1 A. And that was on the select fields.

2 Q. Do you dispute the high STP numbers that
3 we've seen in some of the evidence in this case as an
4 example of what we're looking at on the screen right
5 now?

6 A. Do I dispute that they exist --

7 Q. Yes.

8 A. -- that the data showed that? No.

9 Q. Okay. In your view, is there a -- is there a
10 sample -- well, Gordon Rausser testified about that.
11 Is that biased?

12 MR. GARREN: Objection to form. Is
13 what?

14 Q. (BY MR. ELROD) The demonstrative on the
15 screen, is that biased?

16 THE COURT: Overruled.

17 A. Yes, I believe this data would be considered
18 biased.

19 Q. (BY MR. ELROD) Why?

20 A. Well, for one, the data is a sample that is
21 highly skewed to the people that are required to have
22 Nutrient Management Plans. So only the people that
23 are likely to have an STP that's high are the ones
24 that are providing the soil samples. The ones that
25 are not above 65 that are not -- have not and will not

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
FEBRUARY 18, 2010
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE
VOLUME 100, A.M. SESSION

APPEARANCES:

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1 the law, and that's what we're talking about here
2 today. The law is no runoff or discharge from the
3 land application site. Now --

4 THE COURT: I understand, but you don't
5 have the folks up there enforcing it, right?

6 MR. NANCE: We have two gentlemen who split
7 up this watershed and some other territory who are
8 in charge of inspections and enforcement. And
9 you've seen the case that we've put on to prove
10 edge-of-field runoff and all of that. They simply
11 don't have the means or the training to do what
12 we've done in this case, and that's prove serious
13 substantial nonpoint source runoff originating with
14 this industry.

15 And having shown that, I think that we are
16 -- we're entitled to the remedy I'd like to discuss
17 with you a little bit later.

18 THE COURT: One of the things that neither
19 of you have addressed in your proposed findings and
20 conclusions, and I'd like for you to think at least
21 about the possibility of submitting supplemental
22 proposed findings and conclusions by a reasonable
23 date, but it is this general idea, and I'll throw it
24 up and allow you to shoot it down as a possible
25 approach here, but to the extent that the State of

1 Oklahoma allows application of poultry litter up to
2 a certain amount, that perhaps could remain, given
3 that the State has allowed it through its
4 regulations, but to the extent there is greater
5 poultry litter in a barn than a grower can apply,
6 that the defendant poultry integrators be required
7 to provide a market either by buying it from the
8 growers and transporting it out of state, or
9 providing the market, being the market maker as was
10 tried previously but has since ended, to allow that
11 excess poultry litter beyond that which the State
12 itself permits to be applied on these growers' farms
13 to be transported out of state.

14 So just a thought, and we'll discuss this
15 here at the end. Go ahead.

16 MR. NANCE: Yes, sir. The purpose of the
17 -- I'm going to refer to it as the act because it
18 has such a lengthy and cumbersome full title. But
19 the purpose of the act, as testified by Ms. Gunter
20 when she was here, was, one, just to let the State
21 know who was out there doing what, how many growers,
22 what they were doing. But the other purpose of the
23 act was to ensure that there was no pollution from
24 the operations that were registered. And that is --
25 that's explicitly in the statute we'll look at in a

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Plaintiffs,)	
)	
vs.)	No. 05-CV-329-GKF-PJC
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

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TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
FEBRUARY 18, 2010
BEFORE GREGORY K. FRIZZELL, U.S. DISTRICT JUDGE

REPORTED BY: BRIAN P. NEIL, CSR-RPR, RMR, CRR
 United States Court Reporter

1 authority to impose a 65 STP limit and who have had
2 the authority given to them by the legislature to ban
3 poultry litter and they've done nothing? How can you
4 come into federal court and say it's on the conscious
5 of a federal judge when the very litigant who's
6 demanding the injunction refuses to act? The only
7 explanation they give you is, gee, it's politically
8 difficult.

9 There's only one plaintiff in this case, Your
10 Honor. It's the whole unitary State of Oklahoma.
11 There is no evidence for any injunction beyond this
12 ban or beyond the 65 STP limit and it's not worthy
13 really of consideration.

14 On page 59, we have very briefly outlined the
15 other side of the hardships. You have basically only
16 the most simplistic and half-hearted analysis of even
17 the basic question of what it would cost to haul the
18 litter out. The state didn't put on evidence and they
19 don't want to talk about the cost to growers. They
20 don't want to talk about the cost to litter-haulers
21 and spreaders. They don't want to talk about people
22 like Mr. Anderson who are going to lose most of their
23 cattle herd because they can't afford to fertilize
24 their fields for forage.

25 You suggested -- and I thought it was an

1 interesting suggestion -- that perhaps the defendants
2 should be ordered to make a market in poultry litter
3 so that more of it would move.

4 THE COURT: Which they've already
5 attempted voluntarily to do --

6 MR. HOPSON: And they're continuing to
7 do.

8 THE COURT: I understand.

9 MR. HOPSON: And the truth is, if we
10 believe in free markets -- and I think we do -- we
11 heard testimony from this witness stand that the free
12 market is working and people are putting their own
13 money on the line to invest in litter-hauling
14 operations.

15 THE COURT: I'm afraid that may be an
16 overstatement, though, Mr. Hopson, that it's
17 working.

18 MR. HOPSON: Well --

19 THE COURT: I mean, there's some
20 evidence that there may be up to 20 percent here
21 hauled out of the watershed, depending on market
22 conditions, maybe in some years. But --

23 MR. HOPSON: That doesn't mean, though,
24 respectfully, sir, that it's not working. It just
25 means that that's the economics of that particular

1 market.

2 And one other thing I wanted to point out --
3 and perhaps it's a trivial point -- but the suggestion
4 that the defendants should be checking up to make sure
5 that the law is followed; in other words, if our
6 grower is only entitled to use three tons of litter
7 because that's what the plan provides but he actually
8 generates five tons, it should be beyond the defendants
9 to come around and check off to make sure that those
10 other two tons are moved off, well, Mr. Tucker put
11 into evidence some inspection reports. The evidence
12 is unequivocal in this case that every grower's farm
13 is inspected once a year just as the legislature
14 ordered.

15 In every annual inspection, you can see it on
16 the form, it's confirmed, that if the litter that's
17 generated is more than the litter that can be used,
18 it's hauled off, it's sold, it's transported.

19 So this notion that we need to make sure that
20 these rules are being followed, I would submit very
21 respectfully, Your Honor, is already in the record
22 that the law is being followed. And when you combine
23 that with the well-established presumption of
24 regularity that attaches to every state and every
25 federal law, there is no basis in this record to

1 conclude that more needs to be done or that the policy
2 judgments and the decisions of the legislatures in
3 Arkansas and Oklahoma need to be overturned.

4 We did put on some evidence -- admittedly not
5 a lot -- but we put on some evidence of the impact of
6 an injunction. We know, for example, that the cost of
7 purchasing and applying a ton of litter is about 30
8 bucks. The cost of purchasing and applying an
9 equivalent amount of nitrogen, assuming for a minute
10 that there is a sufficient amount of phosphorus on
11 that field, is almost twice as much. When you apply
12 an equivalent amount of phosphorus and nitrogen, the
13 multiples get even higher. There are enormous costs
14 and real costs.

15 There was a question about where the word
16 "devastating" came from this morning because we had
17 "devastating" in quotations. If you look at the
18 transcript of this trial at 4590, a grower,
19 Mr. Saunders, you may recall, was asked, "If you lost
20 your poultry litter, what would be the effect on your
21 overall operation?"

22 "ANSWER: It would be devastating."

23 THE COURT: Yeah. I read that yesterday
24 in connection with the citations made.

25 MR. HOPSON: I don't think that it's

1 their government have reached a different conclusion
2 than what's being pressed by this plaintiff. I just
3 think that's not right.

4 THE COURT: Well, keep in mind with
5 these supplemental findings and conclusions and the
6 court's suggestion that we address this possibility,
7 it would maintain that ownership interest in the
8 growers.

9 MR. TUCKER: Let me talk about that,
10 Your Honor, because that is a little bit of a two-way
11 street.

12 Let me first start with the premise the court
13 observed that there's too much litter in the basin to
14 be properly used. I want you to recall the testimony
15 of Dr. Clay that there are 500,000 cleared acres that
16 are used for agriculture in that million-acre
17 watershed. There are 350,000 tons of litter produced
18 each year according to the plaintiff's numbers.
19 That's less than 6/10 of an acre to be applied to
20 500,000 acres of the watershed with an average STP
21 which is well below 50. So there's space in the
22 watershed to do it.

23 THE COURT: Well, but we have testimony
24 that not everybody wants it on their land.

25 MR. TUCKER: That's correct.

1 THE COURT: Number two, as you
2 acknowledge, there's portions of the watershed where
3 application cannot be made.

4 MR. TUCKER: That's correct.

5 THE COURT: So go ahead.

6 MR. TUCKER: Let me move on to your idea
7 and the concept of the existence of the litter market,
8 which Mr. Hopson said he believes that the system is
9 working under the free market and you had some
10 concerns about it.

11 Let me suggest that, for example, there are
12 some Cargill growers who have never applied litter
13 because they don't have soil that can accept any
14 litter, they have always sold their litter. They have
15 sold their litter because there is a market for
16 litter. Now, whoever buys the litter, whoever
17 delivers the litter, wherever that litter goes it can
18 only go down, whether it's in the Illinois River
19 Watershed or outside the watershed, if it's in
20 compliance with a waste management plan. If the waste
21 management plan doesn't exist and the field cannot
22 accept litter, then that litter has to go someplace
23 else. That doesn't mean when a grower sells litter,
24 it has to be sold outside the watershed. It can be
25 sold inside or outside the watershed.

1 Now, Your Honor suggests some sort of a
2 method where the companies would create a litter
3 market. A litter market exists today. If you want to
4 modify that litter market, for example, to say that
5 the litter all has to go outside the watershed and the
6 grower -- or the companies have to buy it, then Your
7 Honor will have to set the price. Because if I know
8 that I only have one person to sell my litter to and I
9 know that person has to buy my litter, my litter is
10 going to be worth two or three hundred dollars a ton.
11 I don't think this court wants to get in the business
12 of setting the prices in the litter market.

13 If there weren't a litter market, which was
14 evidenced that there is one by the hauler who appeared
15 before us and told us that that's his business is
16 buying and selling litter and marking it up and
17 delivering it, then I think Your Honor might have a
18 point. But there is a market that does exist. We, of
19 course, are going to take your suggestion and consider
20 that issue, but I think your concern is misplaced that
21 there is a need for that as the market itself is
22 dealing with that.

23 Now, on the concept of proof, I don't want to
24 get down in the weeds with that. Mr. Hopson has
25 scoured the field and hunted for the truffles and I

1 do this, but you gave us the short fuse on the
2 findings because the spreading will start soon.
3 Particularly as regards a moratorium, we think that
4 should be the first step so things don't get worse,
5 and so we ask you to enter an injunction in that
6 fashion.

7 We thank you again, Your Honor.

8 THE COURT: Thank you very much.

9 Mr. Nance, Mr. George, do you wish to file
10 any supplemental findings and conclusions?
11 Mr. Jorgensen?

12 MR. GEORGE: Your Honor, the court has
13 indicated that it might be of some benefit to the
14 court. In light of that, we would like to be heard
15 briefly through some supplemental filings.

16 THE COURT: Well, I'd like you to at
17 least shoot down that balloon, if it needs to be, or
18 bolster it.

19 MR. NANCE: And when would you like
20 that, Your Honor?

21 THE COURT: Well, what's reasonable
22 here?

23 MR. GEORGE: Ten days from today, Your
24 Honor.

25 MR. NANCE: It's agreeable.

1 THE COURT: All right. Let's do that.

2 Counsel, if you'll approach here.

3 *(Bench conference outside the hearing of the jury)*

4 THE COURT: This is on the record.

5 I wanted to let you all know that -- of
6 course we've not only, as you well know, been in trial
7 now for four months with pretrial matters, motions in
8 limine, this has monopolized a good portion of the
9 court's time.

10 I have -- as those of you who have clerked
11 know, I've got a mandate to get some other cases
12 actually decided. And with all due respect, although
13 I -- I am very familiar how important this case is,
14 I've got to get some other work done and I have to
15 take care of these other matters, some of which
16 frankly have gone way too long without being decided.

17 In addition, there's some death penalty
18 habeas matters that I've inherited, some as much as
19 eight years old. And some of the movers and shakers
20 on the Tenth Circuit rightly so have told the judges,
21 I just learned yesterday through our chief judge, that
22 apparently our one designated law clerk here is not
23 getting them out as quickly as the Tenth Circuit
24 judges want them to be and have directed us to take
25 them back into chambers.